No. 91-160

Supreme Court, U.S.
FILED
JUL 26 1991
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FIRST FEDERAL SAVINGS BANK & TRUST, *et al.*,
Petitioners,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Financial Institutions Reform, Recovery and Enforcement Act of 1989 preserves preexisting contracts with government agencies?

II. Whether post-seizure, narrowly circumscribed judicial review of the Director's action violates procedural due process?

III. Whether a district court has jurisdiction to grant declaratory and injunctive relief where government agencies repudiate contractual obligations?

PARTIES TO THE PROCEEDINGS BELOW

In addition to First Federal Savings Bank & Trust, the following parties were plaintiffs-appellants in the court of appeals: First Federal Bancorp, Inc., a Delaware corporation, Lakeland Service Corporation, a Michigan corporation, and Citizens Federal Savings Bank, a federal savings bank.

Defendants-appellees in the court of appeals were: the Director, Office of Thrift Supervision in his official capacity and as successor in interest to the Federal Home Loan Bank Board, the Federal Home Loan Bank of Indianapolis, and the Federal Deposit Insurance Corporation, in its own capacity and as successor in interest to the Federal Savings and Loan Insurance Corporation.

RULE 29.1 LISTING

Petitioner First Federal Savings Bank & Trust, a federal savings bank, is a wholly owned subsidiary of petitioner First Federal Bancorp, a Delaware Corporation. Petitioner Lakeland Service Corporation, a Michigan Corporation, is a wholly owned subsidiary of petitioner First Federal Savings Bank & Trust. Petitioner Citizens Federal Savings Bank is a wholly owned subsidiary of petitioner Lakeland Service Corporation.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

First Federal Savings Bank & Trust, et al.[1] (hereafter First Federal) respectfully request that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in *First Federal Savings Bank & Trust v. Ryan*, 927 F.2d 1345 (6th Cir. 1991).

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[1] The petitioners include First Federal Savings Bank & Trust, a federal savings bank, First Federal Bancorp., Inc., a Delaware corporation, Lakeland Service Corporation, a Michigan corporation, and Citizens Federal Savings Bank, a federal savings bank.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 927 F.2d 1345 and is reprinted in the Appendix (App.) p. 1a. The opinion and order of the United States District Court for the Eastern District of Michigan has not been reported. It is reprinted at App. p. 33a.

This case was decided together with a companion case involving similar issues entitled *Franklin Federal Savings Bank v. Office of Thrift Supervision*, 927 F.2d 1332 (6th Cir. 1991), *cert. pending*, No. 90-1881.

JURISDICTION

Petitioners brought this suit in the United States District Court for the Eastern District of Michigan on July 3, 1990 by invoking federal jurisdiction under 12 U.S.C. §1464(d)(1)(A) and 12 U.S.C. §1819(a) and (b)(2)(A), which authorize a federal savings association to sue the Office of Thrift Supervision (OTS) and the Federal Deposit Insurance Corporation (FDIC) on any matter (excepting money damages) in district court, as well as 28 U.S.C. §§1331, 1337, 1358, 2201, 2202 and 5 U.S.C. §702. On July 19, 1990, the district court denied the petitioners' motion for preliminary injunction. App. p. 34a.

On petitioners' appeal, the Sixth Circuit entered a judgment and an opinion affirming the district court's order. The judgment of the court of appeals was rendered on March 12, 1991. A petition for rehearing with a suggestion for rehearing en banc was timely filed and was denied on May 21, 1991. App. p. 39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution which provides in pertinent part:

> . . . [N]or shall any person . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

It also involves §§ 301, 401(g), and 501 of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA),

Pub. L. No. 101-73, 103 Stat. 183 (codified in various sections of 12 U.S.C.), App. p. 40a.

STATEMENT OF THE CASE

A. Nature of the Case

This case concerns the justiciability of petitioners' claims that government regulators overstepped their authority by reneging on promises made when First Federal purchased a failing Florida savings and loan. By breaking those promises, the regulators pushed a healthy institution into insolvency and then threatened to appoint a receiver — the equivalent of a corporate death penalty — ex parte and without notice. First Federal's principal wrong was its September, 1988 agreement with predecessor agencies to acquire a failing thrift under a special government program to induce healthy thrifts to bail out failing institutions. An essential term in that contract provided that First Federal could amortize $10.5 million in "supervisory goodwill", an intangible asset,[2] over 12 years. The government also expressly promised that the financial statement of First Federal, the healthy parent, would not be consolidated with the financial statement of the failing subsidiary in measuring regulatory capital compliance over a five-year period.

First Federal, a federally chartered stock savings bank, opened its doors in 1934 as a federally chartered mutual savings and loan. At the time it filed its complaint, First Federal had 28 branches, 100,000 customer accounts, and nearly 400 employees. Most of its branches were located in Oakland County, Michigan, the second wealthiest county in the Midwest. As of March 31, 1990, First Federal, the fifth largest thrift in Michigan, had assets of $1.2 billion and a profitable history. In addition, its loan losses between 1985-1989 had not exceeded $500,000 in toto. Between 1985-1989, First Federal operated profitably. Under generally accepted accounting principles (GAAP), First Federal had a net worth of $31.6 million.

On September 1, 1988, First Federal Bancorp (FFB) contracted with the Federal Savings & Loan Insurance Corporation (FSLIC) and

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[2] See generally, Helfer & Richardson, "Goodwill and Government Promises" 2 *Stanford L & Pol. Rev.*, 117, 118 (Spring, 1990), defining goodwill under generally accepted accounting principles (GAAP) as the difference between the amount paid for the institution and the market value of the acquired institution's assets.

the Federal Home Loan Bank Board (FHLBB) to acquire Citizens Federal Savings and Loan Association (Citizens), a failing Florida thrift, under the so-called "Expedited Case Processing" program. All the documents were drafted and generated by the government agencies and were presented together in one package for First Federal's representatives' signature. FFB had been invited to bid on old Citizens as part of FSLIC/FHLBB's 1988-1989 "insolvent institution" program. The Expedited Case Processing program was FSLIC/FHLBB's effort to recapitalize troubled thrifts with private capital. FSLIC/FHLBB turned to private capital because the savings and loan insurance fund was virtually insolvent and because Congress took no action to appropriate public monies to solve this crisis. Without public monies to match private capital, it was hardly surprising that FSLIC/FHLBB had to develop other policies to have investors take an active role in a massive thrift bailout. FSLIC/FHLBB — with the knowledge of Congress and the White House — entered into contracts with numerous investors and solvent thrifts. Pursuant to these contracts, FSLIC/FHLBB agreed to take certain actions and forbear from others so that the healthy institution acquiring the failing thrift had sufficient time to re-establish its previously strong and unblemished financial condition. In short, the quid pro quo was obvious: for the influx of private capital, the agencies agreed to give the institutions time to absorb the troubled thrifts.

First Federal was one of the 96 financial institutions in the United States which took over insolvent thrifts in these FSLIC/ FHLBB transactions during 1988 and 1989. *See, RTC Report to Congress and the RTC Oversight Board*, Vol. 1, Appendix I, September 18, 1990. Consistent with the overall objective of the FSLIC/FHLBB policy, by acquiring Citizens, First Federal saved the FSLIC from recognizing a loss of $8-10 million and relieved FSLIC from payouts to the insured depositors of Citizens in that amount. As part of the bidding process, First Federal paid FSLIC $500,000 in consideration for the Citizens' acquisition.

As with the other transactions, petitioners and FSLIC/FHLBB entered into a "contract made under and governed by federal law." Joint Appendix, p. 122, Regulatory Capital Maintenance and Dividend Agreement. In exchange for First Federal's agreement to acquire the insolvent Florida thrift, FSLIC/FHLBB granted First Federal certain

concessions including a promise to recognize supervisory goodwill as an intangible asset in measuring compliance with regulatory capital requirements. Pursuant to the agreement, First Federal submitted KPMG Peat Marwick's report which attributed $10.5 million to supervisory goodwill and provided a term of amortization of that goodwill for 12 years. Only by treating this supervisory goodwill as capital for regulatory purposes could Citizens be deemed solvent and the acquisition go forward. In the contract, FSLIC/FHLBB made additional promises upon which First Federal detrimentally relied, including forbearance from enforcing certain regulatory capital requirements for five years and an explicit promise that the assets and liabilities of First Federal, the solvent parent, would not be consolidated with Citizens, the insolvent subsidiary, in measuring capital compliance. *See*, Joint Appendix, p. 125-126.

These concessions were central to First Federal's decision to acquire old Citizens. Without such concessions, First Federal would have become instantly insolvent. In fact, without the concessions, the supervisory merger could have never been approved. Never, under any circumstances, would First Federal have willingly committed "economic suicide". *Far West Federal Savings Bank v. Director, Office of Thrift Supervision*, 746 F. Supp. 1042, 1050 (D. Ore. 1990).[3]

Just 11 months after First Federal acquired Citizens, in August, 1989, Congress passed FIRREA. This legislation abolished FHLBB and FSLIC and replaced them with the OTS and the Resolution Trust Corporation (RTC). Congress transferred regulatory oversight of savings and loan institutions to the OTS. 12 U.S.C. §1462a(e). Although FIRREA eliminates and/or phases out the use of supervisory goodwill in calculating capital requirements, it also contains §401(g), codified at 12 U.S.C. §1437 note, which preserves prior FSLIC/FHLBB obliga-

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[3] Although there has been disagreement in this case whether petitioner FFB and the predecessor agencies entered into a contract, that factual dispute is irrelevant at this stage. Petitioners' complaint and appended exhibits alleged the existence of a binding contract. *See*, Joint Appendix, p. 10-264. While the court of appeals questioned whether there was a contract, the rulings below effectively conclude that there is no jurisdiction over petitioners' complaint and that if there were jurisdiction, petitioners have failed to state a claim upon which relief may be granted — *i.e.*, in the companion case of *Franklin Federal*, the court of appeals held that all such contracts were constitutionally abrogated by Congress in FIRREA. Thus, at this stage of the litigation, the allegations of the complaint must be accepted as true. *See, Conley v. Gibson*, 355 U.S. 41, 46 (1957).

tions and §501, codified at 12 U.S.C. §1441a(b)(11)(B), which directs the RTC to study the 1988-1989 insolvent institution cases — including this case — and find methods to restructure and modify those contracts. FIRREA nowhere authorizes OTS or RTC to abrogate their predecessors' contractual obligations.

In November, 1989, OTS issued new capital regulations pursuant to FIRREA. (12 C.F.R. §567, et seq.) In Thrift Bulletin 38-2, the OTS applied the new capital standards to *all* savings associations, including those that had been granted capital and accounting forbearances. App. p. 46a. OTS interpreted §5(t) of the Homeowners Loan Act of 1933 (HOLA), codified at 12 U.S.C. § 1464 (f), as amended by FIRREA, to eliminate *all* previously granted forbearances, including those granted in existing contracts. Every savings association which had any forbearances was directed to eliminate them in determining their capital compliance. If an association determined it would fail to meet its minimum regulatory capital requirements, it was directed to submit a capital plan in accordance with Thrift Bulletin 36. Further, OTS stated that no capital plan would be accepted if it included the continuation of previously granted capital and accounting forbearances.

OTS' new regulations also imposed consolidated reporting requirements on parents and subsidiaries in calculating capital compliance. 12 C.F.R. §567(a)(2)(vi); App. p. 45a. OTS imposed such consolidated capital reporting requirements on parents and subsidiaries, even though FIRREA had exempted subsidiaries acquired before May, 1989 from such requirements. §301(5)(t)(C)(ii) and (E), codified at 12 U.S.C. §1464(t)(5)(C)(ii) and (E).

First Federal subsequently requested but was denied a statutory exemption in light of its contract with FSLIC/FHLBB. OTS thereafter rejected two capital plans submitted by First Federal in attempted compliance with the new regulations.[4]

In addition to First Federal's inability to use supervisory goodwill in the calculation of capital compliance, the new regulations also harmed First Federal because OTS prohibited Citizens from any growth, thus impairing the earnings of both Citizens and First Federal. First Federal also reduced its own available capital to infuse in excess

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[4] The government conceded in the district court that the capital plan denials were ripe for review.

of $7 million into Citizens in order to satisfy its contractual obligations and meet regulatory capital requirements. OTS issued a supervisory directive to First Federal requiring it to stop making any commercial loans and mandated other extremely anticompetitive and restrictive operating requirements.

In May, 1990, OTS regional officials specifically threatened to appoint a conservator or receiver for First Federal. OTS regional officials presented First Federal's Board of Directors with, and pressured them to sign, a consent agreement and stipulation to the appointment of a receiver. By signing these documents, First Federal would have conceded its insolvency, agreed to the appointment of a receiver or conservator at any time, and waived its right to litigate and appeal. OTS also threatened civil penalties against individual directors if they failed to sign and agree to the conditions in the consent agreement. 12 U.S.C. §1818(i)(2)(A)-(C) permits daily penalties on a bank or a bank's officers or directors ranging from $5,000 to $1,000,000, depending on the offense.

At the same time, OTS had proposed that wildly fluctuating loan loss reserve requirements be placed on the commercial loan portfolio, but had failed to issue a final report deciding the amount of required loan loss reserves. This blocked the institution from pursuing administrative appeals. Moreover, officials at First Federal also had good reason to believe they had been placed on a list of institutions to be sold.

First Federal officials concluded that resort to federal court was essential to protect any hope of continued corporate existence. The appointment of a receiver and instantaneous merger of First Federal would have amounted to a corporate death penalty. Such an appointment would result in irreparable injury because of the likelihood of immediate liquidation.

Under current expedited procedures, a failing institution cannot meaningfully challenge the receiver's action after appointment. The receiver is appointed and sells the thrift in a single transaction, leaving the thrift and its shareholders, whose investment has been wiped out in the foregoing transaction, without any meaningful chance to question, let alone prevent, the closing of the thrift, the appointment of the receiver and the sale of the thrift to the preferential bidder.

In its complaint, First Federal sought to restrain the threatened appointment of a conservator or receiver, not in the future as against every unknown contingency, but because regulators had exceeded their delegated powers by breaking their contractual promises and threatening the appointment of a receiver for an insolvency which the government itself had induced. First Federal also sought a declaration that OTS had violated its contract and FIRREA in applying its new capital standards to petitioners. Finally, petitioners asked for rescission of the contract.

B. Posture of the Case

The district court found subject matter jurisdiction under 12 U.S.C. §1464(d)(1)(A) and opined that the matter was ripe for judicial review since the Bank's capital plan had been rejected. The district court, however, rejected petitioner's request for an injunction. The district court conceded that pre-appointment injunction of a receiver was not expressly precluded by statute, but found it had no pre-appointment power to restrain the appointment of a receiver because of the clause which deals with post-appointment review. 12 U.S.C. §1464(d)(2)(E). App. p. 40-41a.

The district court assumed that First Federal's acquisition of Citizens, the failing Florida thrift, was a contract. The district court held that the government is not bound by its contractual obligations when its performance is excused because it is complying with Congressional mandates. Finally, the district court ruled that neither OTS' actions nor Congress' purported abrogation of contracts in FIRREA constituted a Fifth Amendment takings or due process violation. The court further noted that, in any event, injunctive relief is unavailable for a wrongful taking. The district court thus denied First Federal any declaratory or injunctive relief. App. p. 34a.

First Federal appealed the district court's ruling to the Sixth Circuit. The Sixth Circuit affirmed the district court's ruling in a two to one opinion. The majority limited its discussion of the issues to the propriety of enjoining the appointment of a receiver. The court decided that petitioners' claims could not be the basis for equitable relief — First Federal must await the appointment of a receiver before its injunctive claims can be considered. The majority also ruled that the statutory mechanism for review was constitutionally adequate because First Federal could file a post-receivership action and also could sue for

money damages in the event of a wrongful appointment. The majority thus ignored First Federal's claims for declaratory and injunctive relief on the contract abrogation claim. The dissenting opinion found First Federal's contract claims *were* ripe. App. p. 28a.

In a companion case (*Franklin Federal Savings Bank v. Director, OTS*, 927 F.2d 1332 (6th Cir. 1991), *cert. pending*, No. 90-1881) the court of appeals ruled on the substantive claims raised by petitioners. The court in *Franklin Federal* held that Congress in FIRREA abrogated all of the contracts entered into by FSLIC/FHLBB. The court also held that insofar as FIRREA confiscated the property of investors, the remedy was compensation in the claims court.

As in this case, in *Franklin Federal*, Judge Contie dissented. He concluded that the predecessor agencies had entered into valid, enforceable contracts and that Congress in FIRREA had nowhere expressly repudiated these agreements. To the contrary, Judge Contie observed that Congress in § 401(g) of FIRREA had specifically preserved these contracts.

REASONS FOR GRANTING THE WRIT

In this case and the companion case, *Franklin Federal*, the court of appeals incorrectly decided important questions of federal statutory and constitutional law triggered by Congress' enactment of FIRREA. The effect of FIRREA on scores of savings and loans has spawned substantial litigation throughout the lower federal courts.[5] In a number

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[5] *Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 738 F.Supp. 1564 (D. Ore. 1990), appeal docketed, No. 90-35752 (9th Cir. filed Sept. 19, 1990); *Security Savings & Loan Association, et al. v. Director, Office of Thrift Supervision*, 761 F.Supp. 1277 (S.D. Miss. 1991), *appeal docketed*, No. 91-1570 (5th Cir. filed May 28, 1991); *Sterling Savings Association v. Ryan, Director, Office of Thrift Supervision*, 751 F.Supp. 871 (E.D. Wash. 1990), *appeal docketed*, No. 91-35101 (9th Cir. filed Dec. 27, 1990); *Carteret Savings Bank v. Office of Thrift Supervision*, 762 F.Supp. 1159 (D.N.J. 1991), *appeal docketed*, No. 91-5290 (3rd Cir. filed April 23, 1991); *Hansen Savings Bank, et al. v. Office of Thrift Supervision*, 758 F.Supp. 240 (D.N.J. 1991); *Century Federal Savings Bank v. United States*, 745 F.Supp. 1363 (N.D. Ill. 1990); *Winstar Corporation v. United States*, 21 Cl. Ct. 112 (1990); *El Paso Savings Association v. Director, Office of Thrift Supervision*, No. EP-89-CA-426-H, Slip Op. (W.D. Tex. Jan. 8, 1990); *Flagship Federal Savings Bank v. Wall*, 748 F.Supp. 742 (S.D. Cal. 1990); *Saratoga Savings and Loan Association v. Wall*, No. 89-3305, Slip Op. (D.D.C. May 16, 1990); *Cenlar Federal Savings Bank, et al. v. Director, Office of Thrift Supervision, et al*, No. 90-4782 (D.N.J. Complaint filed

of cases, injunctions have been entered enjoining the OTS from applying the provisions of FIRREA.[6] Given the sweep of authority asserted by the OTS under FIRREA, more litigation can be expected.

The uncertainties in the law caused by FIRREA and this flood of litigation have had severe destabilizing effects on the savings and loan industry. While some savings and loans have obtained injunctive relief, the uncertainty over the reach and constitutionality of FIRREA has nonetheless chilled investors from investing capital and placed a substantial cloud over the entire range of transactions and businesses engaged in by dozens of savings and loans.

This case and the companion case of *Franklin Federal* both involve claims that Congress in FIRREA did not intend to abrogate contracts made between FSLIC/FHLBB and numerous savings and loans, and that such legislation constitutes an unconstitutional taking and a violation of due process. The courts of appeals which have held that Congress in FIRREA abrogated these contracts have acted contrary to established principles of statutory interpretation. Although no conflict in the circuits has yet to develop on these issues, this Court has repeatedly granted certiorari without awaiting a conflict in cases involving the financial institutions industry because of the need for prompt review to clarify the law and stabilize the industry. *See, FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426 (1986); *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987); *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 207 (1984).

Because of the overlap between this case and *Franklin Federal*, the Court may wish to grant plenary review in that case on the FIRREA issues and dispose of this petition in light of the decision in

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Dec. 13, 1990); *Charter Federal Savings Bank v. Director, Office of Thrift Supervision, et al*, No. 91-0012 (W.D. Va. Complaint filed Feb. 4, 1991)

[6] *Far West Federal Bank, S.B. v. Director, Office of Thrift Supervision*, 738 F.Supp. 1564 (D. Ore. 1990), *appeal docketed*, No. 90-35752 (9th Cir. filed Sept. 19, 1990); *Security Savings & Loan Association, et al v. Director, Office of Thrift Supervision*, 761 F.Supp. 1277 (S.D. Miss. 1991), *appeal docketed* No. 91-150 (5th Cir. filed May 28, 1991); *Sterling Savings Association v. Ryan, Director, Office of Thrift Supervision*, 751 F.Supp. 871 (E.D. Wash. 1990), *appeal docketed*, No. 91-35101 (9th Cir. filed Dec. 27, 1990); *Carteret Savings Bank v. Office of Thrift Supervision*, 762 F.Supp. 1159 (D.N.J. 1991) *appeal docketed*, No. 91-5290 (3rd Cir. filed April 23, 1991); *Hansen Savings Bank, et al. v. Office of Thrift Supervision*, 758 F.Supp. 240 (D.N.J. 1991).

Franklin Federal. However, this case also raises two important issues not raised in *Franklin Federal*. First, the court of appeals held that petitioners' remedy for illegal repudiation of its contract was in the Claims Court, and that equitable relief was not available in district court to enjoin OTS' illegal actions. This ruling is flatly inconsistent with the Federal Circuit's ruling in *Far West Federal Bank v. Office of Thrift Supervision*, 930 F.2d 883 (Fed. Cir. 1991). Second, the court of appeals held that a savings and loan facing seizure by the government is entitled only to a post-deprivation hearing. This ruling conflicts with this Court's cases defining procedural due process. Accordingly, plenary review is warranted on these important issues.

ARGUMENT I

FIRREA PRESERVES PREEXISTING 1988-1989 CONTRACTS, RIGHTS, DUTIES AND OBLIGATIONS OF FSLIC/FHLBB.

In *Franklin Federal*, the court of appeals held that Congress in FIRREA intended to abrogate existing contracts made by FSLIC/FHLBB. The Sixth Circuit's decision in *Franklin Federal* controls petitioners' identical claims. As the petition in *Franklin Federal* makes clear, this ruling is erroneous and warrants review by this Court.[7] FIRREA nowhere expressly authorizes regulators to abrogate contract concessions given to buyers of troubled savings and loans before the law's enactment. OTS contends that the new law authorized them to disregard such concessions, but it can point to no explicit statutory authority for this position. Indeed, the preexisting obligations of contract were expressly preserved in FIRREA §401(g). App. p. 42a.

In *Far West*, 930 F.2d 883, 886, the Court of Appeals for the Federal Circuit recently cited the language of §401(g), as preserving existing contract obligations of FSLIC and FHLBB. As Judge Contie noted in dissent, "section 401(g)'s express wording preserves the government's existing 'duties' and 'obligations' which necessarily included bargained-for (*quid pro quo*) forbearances." *Franklin Federal*,

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[7] Petitioners respectfully refer this Court to the §401(g) argument presented in Franklin Federal's petition for a writ of certiorari; petitioners will not repeat the arguments presented there, but instead address noncumulative points not raised in Franklin's petition.

927 F.2d at 1343 (Contie, J., dissenting). The Court of Appeals for the Federal Circuit's recognition that FIRREA preserved pre-existing contracts is shared by several lower courts which have construed FIRREA. See, e.g., *Sterling Savings Association v. Ryan*, 751 F. Supp. 871 (E.D. Wash. 1990), appeal docketed, No. 91-35101 (9th Cir. filed December 22, 1990); *Security Savings and Loan Association, et al v. Director, OTS*, 761 F. Supp 1277 (S.D. Miss. 1991), appeal docketed, No. 91-1570 (5th Cir. May 28, 1991); *Cartaret Savings Bank v. Office of Thrift Supervision*, 762 F. Supp. 1159 (D.N.J. 1991), appeal docketed, No. 91-5290 (3rd Cir. April 23, 1991); *Hansen Savings Bank v. Office of Thrift Supervision*, 758 F. Supp. 240 (D. N.J. 1991).

By contrast, in *Guaranty Financial Services v. Ryan*, 928 F.2d 994 (11th Cir. 1991) and in *Franklin Federal*, the Eleventh and Sixth Circuits, finding the question whether FIRREA extinguished the contractual forbearances ambiguous, cured Congress' failure to grant explicit powers to the OTS to abrogate the prior conversion agreements by scouring the legislative history to glean such an intent from various legislators' statements. This Court has repeatedly advised judges to avoid elevation of legislative history to the status of text to cure congressional inaction or faintheartedness. *See, West Virginia University Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991).

The OTS' view, which it has repeatedly advanced, that the §401 (g) savings clause preserved only procurement contracts and leases into which FSLIC and FHLBB entered lacks validity. A simple reading of §401(g) reflects an intent to preserve *all* preexisting obligations. If Congress intended to preserve only those rights, duties and obligations of FSLIC and the FHLBB that were not inconsistent with the regulations implementing FIRREA's capital requirements, it could easily have said so. Congress could have restricted the language of the savings clauses to the sorts of procurement contracts urged by the government. Congress, in section 225 of FIRREA, codified at 12 U.S.C. §1831(g), for example, legislated specific rules concerning the ability of regulated thrifts to contract for goods and services. Had Congress intended §401 to apply only to procurement contracts, it could have said so. The Sixth Circuit should not have improved on Congress' product. *See, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991) ("[O]ur inquiry is complete if we find the text * * * to be clear and unambiguous.");

Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 460 (1989) ("Our task is to apply the text, not to improve upon it.").

Section 401 (g) must also be analyzed in relation to other sections of FIRREA. *See Pierce v. Underwood*, 487 U.S. 552 (1988). Section 501(a) of FIRREA, codified at 12 U.S.C. §1441a(b)(11)(B)(i), directed the RTC to "review and analyze all insolvent institution cases resolved by the [FSLIC] between January 1, 1988, and August 9, 1989 . . ." App. p. 43a.

FIRREA thus required the RTC to study and report on legal options as to all the 1988/1989 "insolvent institution" cases, of which this case is one. The RTC thereafter informed Congress that FIRREA had not granted it any powers to abrogate or repudiate these agreements. *See, RTC Report To Congress And The Oversight Board of the RTC*, Vol. I, Appendix IV ("Legal Opinion to RTC — RTC's Rights Under FIRREA"), September 18, 1990.

Section 501 is unambiguous in expressing an intent not to disturb rights of those who contracted with FSLIC/FHLBB. It provides:

> Nothing in this paragraph shall be construed as granting the Corporation any legal rights to modify, renegotiate, or restructure agreements between the Federal Savings and Loan Insurance Corporation and any other party, which did not exist prior to August 9, 1989.

12 U.S.C. §1441a(b)(11)(B). Congress did not empower the RTC to abrogate or repudiate unilaterally the agreements to which FSLIC was a party, but intended that RTC honor the contracts which limited FSLIC costs and in reliance upon which private parties had invested huge sums of money. In *Sterling Savings*, the court noted that section 501 "might have relevance . . . That the RTC apparently is reviewing Sterling's agreements . . . and considers these contracts to fall within the category labeled 'existing,' seems to indicate that one regulatory agency does not completely share the OTS' interpretation of FIRREA." *Sterling Savings*, 751 F. Supp. at 888 n. 6.

Clearly, nothing in the text of FIRREA supports the OTS' view that Congress intended to abrogate these agreements. Even the OTS must concede that FIRREA lacks any clear statement of Congress' intent to accomplish this draconian result. Nor should the OTS be able to rely on the inconclusive legislative history to accomplish this result.

This Court has deferred to legislative determinations because they reflect the result of the majoritarian branches accountable to the people. *See, Bowers v. Hardwick*, 482 U.S. 193 (1986); *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985). But if Congress is entitled to such deference, at the same time it must be required to confront and decide difficult policy issues in a clear and decisive fashion. It should not be up to the Court to supply the missing policy decision or analysis constitutionally reposed in Congress. *See, Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986).

To this date Congress has yet to repudiate expressly these contracts made by FSLIC/FHLBB. When FSLIC/FHLBB began to enter into these contracts, Congress sat on the sidelines, failing to appropriate funds which might have averted this entire incident. When Congress in FIRREA finally turned to the savings and loan crisis, it was well aware of the existing obligations entered into by FSLIC/FHLBB. Yet Congress again failed to form a coalition capable of decisively repudiating these agreements. The United States — as much as a private party — is obliged to honor its agreements. *See Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *Lynch v. United States*, 292 U.S. 571 (1934). Only by the clearest of statements should this Court assume Congress sought to retreat from this principle. *Cf. Astoria Federal Savings & Loan Association v. Solimino*, No. 89-1895 (June 10, 1991). Neither this Court nor a legislative committee or sponsor can supply the missing provision of the statute. *Cf. INS v. Chadha*, 462 U.S. 919 (1983).

ARGUMENT II

POST-SEIZURE, NARROWLY CIRCUMSCRIBED JUDICIAL REVIEW OF THE DIRECTOR'S ACTION VIOLATES PROCEDURAL DUE PROCESS.

In *Franklin Federal*, the court of appeals found jurisdiction under the Administrative Procedure Act (APA) to consider the legality of OTS' interpretation of FIRREA. However, in this case and in *Franklin Federal*, the court of appeals held that there was no jurisdiction to challenge the appointment of a receiver until after the OTS seizes a savings and loan. The court of appeals concluded that this preclusion of pre-deprivation review satisfies procedural due process because the

thrift has available a post-receivership action. The court of appeals erred in both its statutory and constitutional analyses.

The Sixth Circuit's broad ruling erroneously foreclosed pre-receivership judicial review of the government's unlawful closing of a savings and loan. The court below found "the language of the statute [12 U.S.C. §1464(d)(2)(E)] provides for review '[i]n the event of such appointment' within a thirty-day period. . . . [t]o us, that suggests that review is only available after a conservator or receiver has been appointed." App. p. 21a. As this Court pointed out in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 674 (1986) "the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

This Court consistently employs a strong presumption that Congress intends judicial review of administrative action. *Bowen*, 476 U.S. at 670. In *Bowen*, this Court reaffirmed the principle "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 670, *quoting, Abbott Laboratories*, 387 U.S. at 140. Furthermore, the government must show:

> clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review. This standard has been invoked time and again when considering whether the [director] has discharged the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision.

Bowen, 476 U.S. at 671-72, *citing Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

This Court recently reaffirmed the presumption that Congress intends judicial review of administrative action in *McNary v. Haitian Refugee Center, Inc.*, 111 S. Ct. 888 (1991). *McNary* challenged the manner in which the Immigration and Naturalization Service (INS) administered provisions of the Immigration Reform Control Act. This Court analyzed the plain language of 8 U.S.C. §1160(e)(1) in relation to 8 U.S.C. §1160(e)(3) and (e)(3)(B) and found that Congress had only addressed direct review of individual denials of Special Agricul-

tural Worker (SAW) status, rather than collateral challenges to unconstitutional practices and policies. *Id.* at 896. It was noted "that had Congress intended the limited review provisions of §210(e) of the INA (Immigration and Nationality Act) to encompass challenges to INS procedures and practices, it could easily have used broader statutory language." *Id.* at 897. Further, if this Court had held that the district court lacked jurisdiction to hear the challenge, the respondents would have been denied meaningful judicial review of their objection to INS procedures. *Id.* at 898.

FIRREA does not *expressly* preclude a district court from reviewing a collateral challenge to OTS' statutory authority under FIRREA. In fact, as Judge Contie noted in dissent, §1464(d)(1)(A) of FIRREA allows a district court to review all matters "under this section or any other applicable law, or regulation thereunder . . ." App. p. 29a. The only clear expression of limited judicial review appears in 12 U.S.C. §1464(d)(2)(E) and (G). Section 1464(d)(2)(E) grants an opportunity to challenge the appointment of a conservator or receiver within 30 days *after* the appointment. A district court is authorized either to dismiss such an action or order the director to remove the conservator or receiver. Moreover, §1464(d)(2)(G) provides that no court can take any action "to restrain or affect the exercise of powers or functions of a conservator or receiver." The purpose of this anti-injunction provision is "to prohibit untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions." *See, Coit Independent Joint Venture v. Federal Savings & Loan*, 109 S. Ct. 1361, 1369-70 (1989) for this Court's construction of a similar anti-injunction clause. The dissent below believed that it was inconsistent to interpret §§ 1464(d)(2)(E) and (G) to require receivership before a thrift could exercise the jurisdictional grant of §1464(d)(1)(A). App. p. 30a. Judge Contie's dissent relies upon *Century Federal Savings Bank v. United States*, 745 F. Supp. 1363, 1367 (N.D. Ill. 1990):

> . . . After appointment, immediate, unobstructed action by the receiver may be essential to conserve the savings and loan associations's assets and prevent panic. *Prior to appointment, injunctive relief may prevent needless liquidation of viable savings and loan associations.* Consistent with the plain language of these subsec-

> tions, §1464(d)(1)(A) confers jurisdiction to enjoin actions by the OTS director pursuant to 1464.

App. p. 30-31a, (emphasis added). Where a statute's language is plain, "the sole function of the court is to enforce it according to its terms." *West Virginia Hospital*, 111 S.Ct. 1138, 1147 (1991). Judicial review of First Federal's challenge to the director's statutory authority is not only presumed, but is plainly afforded under §1464(d)(1)(A). The limited post-appointment review afforded in §§ 1464(d)(2)(E) and (G) do not preclude judicial review of pre-receivership challenges. *See*, 12 U.S.C. §1464(d)(1)(A), *Bowen*, 476 U.S. at 674. Indeed, Judge Contie found the majority's disposition of petitioners' challenge inconsistent with the companion case *(Franklin Federal)* which found Franklin Federal's challenge to the director's authority to abrogate the contract as reviewable. *See*, App. p. 28a.

The OTS' view of the scope of available post-appointment review, which is finding favor in various courts of appeals, will prevent First Federal from any form of meaningful post-seizure judicial review. In First Federal's case, as the regulators would have it, once the director appoints a receiver, First Federal will be unable to challenge OTS' *ultra vires* action. *McNary's* conclusion that Congress did not intend to foreclose all forms of judicial review partially resulted from respondents' inability to obtain meaningful judicial review after an application for SAW status was denied. *McNary*, 111 S.Ct. at 898. The same principle controls here.

Congress did not intend to cut off First Federal's right to mount a district court challenge to OTS' authority to abrogate contractual promises to honor supervisory goodwill and regulatory capital forbearances. As this Court emphasized in *Bowen:*

> The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.

Bowen, 476 U.S. at 671, *citing from* H. R. Rep. No. 1980, 79th Cong., 2d Sess., 41 (1946), U.S. Code Cong. Serv. 1946, p. 1195.

Even if First Federal's challenge is viewed as a direct attack on OTS' grounds for appointment of a conservator or receiver, a pre-seizure hearing is necessary because the post-deprivation remedy under 12 U.S.C. §1464(d)(2)(E) is constitutionally unacceptable.

A challenge to the appointment of a conservator or receiver solely on the basis of a narrow, ministerial review of the OTS' administrative record is an inadequate post-deprivation remedy. The fundamental requirement of due process is the opportunity to be heard "in a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The "right to be heard *before* being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Committee. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring, emphasis supplied).

This Court has consistently employed a balancing test to determine whether a hearing is required before the government deprives a person of a liberty or property interest. In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court established three factors to determine whether a post-deprivation hearing is sufficient to satisfy due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335.

By failing to afford First Federal a hearing prior to the appointment of a receiver on its contract claims, First Federal will suffer irreparable injury.[8] As soon as the OTS appoints the RTC as a

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[8] OTS regional officials presented First Federal with a consent agreement and demanded an immediate meeting with First Federal's Board of Directors. OTS requested First Federal to concede: (1) First Federal had insufficient capital; (2) First Federal was unsafe and unsound; (3) OTS could appoint a conservator or receiver at any time; and (4) First Federal would waive its rights to litigate and appeal. OTS Regional Officials threatened civil penalties and told the Board of Directors that they were recommending to Washington that a receiver be appointed. Joint Appendix, p. 290. Then, on July 3, 1990, OTS ordered bank officials to establish $27.5 million in

receiver, First Federal's doors will be closed. There will be no one left to challenge the director's appointment. The government will either liquidate First Federal and place the burden of indemnifying its depositors upon the taxpayers, or the RTC will strip First Federal of its identity on a Friday and transfer its operations to a secret bidder who opens for business the following Monday. In short, First Federal, a 57-year-old member of Pontiac, Michigan's business community, will have been forced to commit economic suicide without ever having the opportunity to challenge the regulators' authority. The government's ex parte corporate death penalty removes any opportunity for First Federal to challenge meaningfully OTS' actions after the appointment, despite §1464(d)(2)(E). Under OTS' plan, First Federal's demise is meant to occur without a challenge. Though 12 U.S.C. §1464(d)(2)(E) gives First Federal a 30-day period in which to challenge the appointment, OTS' interpretation of the law places the district court in a ministerial capacity to rubber stamp OTS' decision.

The constitutional infirmity of not providing a pre-deprivation hearing is exacerbated by the inadequacy of post-deprivation review. OTS has successfully limited judicial review to on the record review of the agency's ex parte determination. *See,* e.g., *Franklin Savings Association v. OTS,* Nos. 90-3272 and 90-3281, (10th Cir. decided May 28, 1991).

In *Connecticut v. Doehr*, 111 S.Ct. 2105 (1991), this Court reaffirmed the principle that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss, notice of the case against them and an opportunity to meet it." *See, Joint Anti-Facist*, 341 U.S. at 170-172. The practice of solely relying on a paper record has been strongly disfavored by this Court. *See, Califano v. Yamasaki*, 442 U.S 682, 696 (1979); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *Londoner v. City of Denver*, 210 U.S. 373, 386 (1908). *Franklin Savings'* adoption of the government's confinement of the scope of review to the thought processes of the director and a one-sided administrative record creates

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loan loss reserves, $11.5 million more than the previous business day, although this 57-year-old institution had a prior loan loss history of no more than $500,000 from 1985 to 1989 in its commercial loan portfolio. OTS' senior case load manager told First Federal's President, "why do you care, you're dead anyway." Joint Appendix, p. 239.

tremendous room for error when savings associations are seized. The risk of erroneous loss is greatly enhanced when the administrative record is compiled and acted upon by the director who alone serves as prosecutor, judge, jury, and executioner. *See, Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

The Sixth Circuit found the director's power to appoint a conservator or receiver ex parte without notice as a constitutionally acceptable power because of a thrift's post-deprivation remedy under 12 U.S.C. §1464(d)(2)(E). Support for this holding was based on the government's need to take prompt action when a savings and loan is considered insolvent. App. p. 25a. Indeed, this Court has acknowledged the need for emergency action by the agency. *See, FDIC v. Mallen*, 486 U.S. 230 (1988); *Fahey v. Mallonee*, 332 U.S. 245 (1947). Yet, in each instance, this Court specifically relied upon the availability of a *full* post-deprivation hearing. *See, Mallen*, 486 U.S. at 240; *Fahey*, 332 U.S. at 253-54.

The Sixth Circuit mistakenly relied on *Fahey*. In *Fahey*, an opportunity existed for a full-blown administrative hearing after the appointment of a receiver. Moreover, because the lower court in *Fahey* had granted an injunction, the Court itself was not faced with the prospect of immediate adverse action by the administrative agency. In *Fahey*, the regulators had not attempted to merge or sell the affected bank. *Fahey*, 332 U.S. at 257. With the Solicitor General's representation to this Court that no adverse precipitous action would be taken, *Fahey* is quite narrow in scope:

> The government has assured us at the bar that there is no plan for a merger in contemplation . . . In view of the absence of a finding or the threat of confidence to sustain one, we accept the government's assurance that a merger will not follow and, hence, we do not consider it necessary to discuss the legality of hypothetical mergers.

Fahey, 322 U.S. at 257.

Although the Court in *Mathews* relied on the government's and the public's interest in conserving scarce fiscal and administrative resources as a factor that must be weighed, "[t]he ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." At a post-deprivation evidentiary hearing, First

Federal has no meaningful opportunity to challenge the administrative record because no independent proof is allowed. *See Franklin Savings*, Slip Op. at 21.

To satisfy due process, therefore, only a pre-deprivation hearing can properly test the discretionary power of the director and challenge the grounds of appointing a receiver before a thrift such as First Federal is sold and precluded from neutral review. If procedural due process does not require some opportunity for pre-deprivation review, then 12 U.S.C. §1464(d)(2)(E) requires that a thrift be provided a full opportunity to offer evidence challenging the OTS' appointment of a receiver in the post-appointment action.

In 12 U.S.C. §1464(d)(2)(E), Congress authorized the thrift to bring an "action" in federal district court to challenge the appointment of a receiver. The statute directs the court to decide the action "on the merits," and allows the court to order removal of the receiver. *See, Id.* In actions brought by thrifts under §1464 (d)(2)(E), OTS has argued that the district court's task is limited to review of the record compiled by the OTS under the arbitrary and capricious standard of the APA. *See*, 5 U.S.C. §706(2)(A); *Franklin Savings*, Slip Op. at 26. Under this view, in the post-appointment action, a thrift is not allowed — and thus never allowed — to offer its own evidence to challenge the OTS' explanation based on a record compiled and developed solely by the OTS in an ex parte proceeding.

Such an administrative scheme violates the due process clause of the Fifth Amendment. This constitutional infirmity results largely from the erroneous view that in the post-appointment challenge the district court can only scrutinize the OTS record under the arbitrary and capricious standard of the APA. The OTS' reading of the statute is unnatural, and seriously jeopardizes the constitutionality of the statutory scheme. In fact, the statute requires that a savings and loan be allowed to present its own evidence to challenge the OTS' ex parte action. This reading of the statute is compelled by the text of section 1464 (d)(2)(E), the evolution of section 1464 (d)(2)(E) as enacted and amended by Congress through the years, and the governing rules of the APA.

Section 1464 (d)(2)(E) suggests that First Federal be allowed to offer supportive evidence in the district court in any post-appointment action. The statute provides that the thrift may bring an "action" which

the district court is to decide "on the merits" of the challenge — i.e., did there exist one of the statutory grounds for appointment of a receiver. Congress' use of the term "action" and the phrase "on the merits" must mean that a thrift's challenge is in essence an original federal action which the district court is to decide based on its view of the necessity for a receiver. In this "action" — as in any other "action" brought in federal district court — the thrift should be allowed to present evidence in support of its position that the appointment of a receiver was illegal.

The OTS' position that Congress' explicit reference to an "action" to be decided "on the merits" includes only "arbitrary and capricious" review on the OTS record ignores the carefully chosen words of Congress. If Congress meant to describe typical "review" of agency action on the record, it knew how to do so expressly. Indeed, other provisions of FIRREA enacted with §1464(d)(2)(E) reinforce this point. In 12 U.S.C. §1464(j), Congress provided that a party aggrieved by other OTS enforcement actions taken pursuant to §1464 may obtain "review" in the court of appeals and directs the agency to file with the court the "record of the proceeding." As this Court has previously observed, when a statute "permit[s] review . . . the reviewing function is one ordinarily limited to consideration of the decision of the agency or court below and of the evidence on which it is based." *United States v. Bianchi & Co.*, 373 U.S. 709, 714 (1963). In contrast to §1464(j), §1464(d)(2)(E) refers to an "action" without any reference to "review" or an agency "record."

The predecessors to §1464(j) made a similar distinction. §§1464(d)(7)(A)-(B) and (d)(8)(B)(iv) expressly authorized "judicial review" of an agency cease and desist order based on the records, and "review" under the "substantial evidence" standard of 5 U.S.C. §706(2)(E) of civil penalties assessed by the agency. Congress' use of the terms "action" and "on the merits" in §1464(d)(2)(E) stands in marked contrast to the words chosen in the very same section of FIRREA as well as its statutory predecessor. Clearly Congress knew how to provide explicitly for the limited "review" "on the record" now sought by the OTS. Congress' carefully chosen words should not be treated by the agency as only imprecise symbols for an entirely different scheme of review already set out in related parts of the same statutory section.

OTS' claim that an "action" judged "on the merits" amounts to "review on the record" under an arbitrary and capricious standard also flies in the face of Congress' historical drafting of provisions relating to the form and method of judicial scrutiny of agency decisions. Given the number and diversity of administrative agencies created by Congress in the last 100 years, legislative attention to the drafting and adoption of statutes governing the relationship between court and agency has been continuous and deliberate. Congress has demonstrated in literally dozens of statutes that it knows how to specifically provide for "arbitrary and capricious"[9] review or review on the record under the "substantial evidence" test.[10] Through repeated use, Congress has

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[9] 5 U.S.C. §7703(c)(1) (review of MSPB decisions); 7 U.S.C. §12a (review of CFTC orders); 7 U.S.C. §136a (review of EPA decisions); 12 U.S.C. §203 (review of decisions of Comptroller of the Currency); 15 U.S.C. §781(k)(5), 781y(b)(4) (review of SEC orders); 15 U.S.C. §3413(b)(4) (FERC orders); 19 U.S.C. §1516(b)(1)(A) (Orders of the Customs Service); 30 U.S.C. §1276(a)(1) (decisions of the Secretary of Interior); 31 U.S.C. §755 (1) (decisions of the Comptroller General); 38 U.S.C. §4061(a)(3)(A) (review of VA); 42 U.S.C. §300aa-12(e)(2)(B) (review of decision of special master); 42 U.S.C. §2155a(b)(2) (review of NRC decisions); 42 U.S.C. §6213(c) (decisions by the Secretary of the Interior); 42 U.S.C. §7607(d)(9)(A) (EPA decisions); 50 U.S.C. §2412(c)(3) (decisions of the Secretary of Defense).

[10] 5 U.S.C. §7123(c) (FLRA decisions); 5 U.S.C. §7703(c)(3) (MSPB decisions); 7 U.S.C. §136n(b) (EPA decision); 7 U.S.C. §2621(b)(2) (decisions of the Secretary of Agriculture); 12 U.S.C. §93(b)(4) (decisions of the Comptroller of the Currency); 12 U.S.C. §1848 (decisions of the Federal Reserve Board); 15 U.S.C. §21(c) (decisions of ICC, FCC, FTC, Secretary of Transportation, and Federal Reserve Board); 15 U.S.C. §781y(a)(4) (SEC findings); 15 U.S.C. §717r(b) (FERC findings); 15 U.S.C. §1193(e)(3), 1262(e)(3), 1474(b)(3) (CPSC findings); 15 U.S.C. §1710(a) (HUD findings); 15 U.S.C. §1825(b)(2) (decisions of the Secretary of Agriculture); 15 U.S.C. §2004(a) (Department of Transportation determinations); 15 U.S.C. §2618(c)(1)(B) (EPA Findings); 15 U.S.C. §5408(b)(3) (decisions of the Secretary of Commerce); 16 U.S.C. §470ff(b)(1) (decisions of responsible federal land managers); 16 U.S.C. §668(b) (decisions of the Secretary of Interior); 16 U.S.C. §773f(b), 973f(b), 1030(a)(2), 2437(c) (decisions of the Secretary of Commerce); 16 U.S.C. §3142(g)(2) (decisions of the Secretary of Interior); 16 U.S.C. §4016(b)(2)(C) (decisions of the Secretary of Commerce); 19 U.S.C. §1516(b)(2) (decisions of the International Trade Commission); 19 U.S.C. §1643(e)(3), 1677f(f)(5) (decisions of the Secretary of Treasury); 19 U.S.C. §2395(b) (decisions of the Secretary of Labor); 20 U.S.C. §351d(f)(2), 1070c-3(b)(2), 111h(c)(2), & 1234g(c), 1413(d)(3)(C), 1416(b)(2), 2972(h)(3) (findings of the Secretary of Education); 21 U.S.C. §346a(i)(2), 355(h), 360g(c), 370(f)(3) (FDA findings); 21 U.S.C. §877 (decisions of the Attorney General); 22 U.S.C. §1631f(b) (foreign claims determinations); 26 U.S.C. §3310(b) (decisions of the Secretary of Labor); 27 U.S.C. §204(h) (decisions of the Secretary of Treasury); 29 U.S.C. §160(e) (NLRB

indicated that it understands these phrases to be terms of art, each with a precise meaning. Compare *West Virginia University Hospitals*, 111 S. Ct. 1138 (1991). That Congress has spoken clearly in this area is in response to the expectations of this Court, since the Court has repeatedly stated that "[i]n most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates either expressly or by use of a term like 'substantial evidence.'" *Chandler v. Roudebush*, 425 U.S. 840, 862 n.37 (1976) (quoting *Bianchi Co.*, 373 U.S. at 715). Moreover, repeated judicial elaboration of these standards has established an understanding, of which Congress presumably has been and is aware. *See, Bianchi & Co.*, 373 U.S. at 709, ("[T]he standards of review adopted . . . — 'arbitrary,' 'capricious,' and 'not supported by substantial evidence' — have frequently been used by Congress and have consistently been associated with a review limited to the administrative record."). The OTS' efforts to transform the "action . . . on the merits" language of §1464(d)(2)(E) to "review on the record" under the "arbitrary and capricious" test cannot be squared with this longstanding Congressional usage and understanding.[11]

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findings); 29 U.S.C. §210(a) (NLRB findings); 29 U.S.C. §210(a) (findings of the Secretary of Labor); 29 U.S.C. §655(f) (OSHA findings); 29 U.S.C. §660(a) (OSHRC findings); 29 U.S.C. §667(g); 1578(a)(3), 1813(c), 1853(c) (findings of the Secretary of Labor); 30 U.S.C. §818(b), 953(b) (findings of the Secretary of Labor); 30 U.S.C. §1276(b) (findings of the Secretary of Interior); 30 U.S.C. §1462(b) (findings of NOAA); 31 U.S.C. §755(a)(3) (GAO findings); 31 U.S.C. §3805(C) (administrative decisions under the False Claims Act); 33 U.S.C. §505, 520 (findings of the Secretary of Transportation); 33 U.S.C. §907(j)(4) (findings of the Secretary of Labor); 33 U.S.C. §1319(g)(9) (EPA findings); 41 U.S.C. §321 (determinations of agency heads on federal contracts); 42 U.S.C. §263a(k)(3) (HHS determinations); 42 U.S.C. §291h(b) (findings of the Surgeon General); 42 U.S.C. §300h-2(c)(6) (EPA findings); 42 U.S.C. §1320a-7a(e) (HHS findings); 42 U.S.C. §3027(e)(2) (findings of the Commissioner of the Administration of Agency); 42 U.S.C. §5311(c)(3) (findings of Secretary of HUD); 42 U.S.C. §6306(b)(2), 6869(b), 7413(d)(4), 8412(c)(2) (findings of the Secretary of Energy); 42 U.S.C. §9152(c)(2) (NOAA findings); 42 U.S.C. §11023(i)(6) (EPA findings); 49 U.S.C. §1486 (findings of the Secretary of Transportation); 50 U.S.C. §2412(c)(3) (findings of the Secretary of Defense).

[11] Significantly, where Congress authorizes an "action" in court to challenge an agency decision, but seeks to limit the scope of judicial authority, it explicitly limits the action to "on the record" review under the substantial evidence standard. *See*, 16 U.S.C. §470ff(b)(1) (action challenging decisions of federal land managers); 19 U.S.C. §1516(b)(2) (action challenging decisions of ITC); 19 U.S.C. §2395(a)-(b) (action challenging decisions of Secretary of Labor); 42 U.S.C. §405(g) (action

The evolution of §1464(d)(2)(E) from its adoption and subsequent amendments to §1464 further demonstrate that Congress intended an original action in district court, not arbitrary and capricious review on the agency record.

The statutory power to appoint a receiver for a failed savings and loan originated in the Housing Act of 1954. *See*, Pub. L. No. 83-560, ¶503, 68 Stat. 634. The original statute allowed the FHLBB to appoint a receiver but required a hearing prior to the appointment. *See, Id.*, 68 Stat. 635-36. The statute further provided for judicial review under the "Administrative Procedure Act and [such] review shall be upon the weight of the evidence." *See, Id.* 68 Stat. 636; *see, also id.*, 68 Stat. 635 (Bank Board cease and desist orders can be appealed "as is provided by the Administrative Procedure Act, and . . . review . . . shall be upon the weight of the evidence"). In the Financial Institutions Supervisory Act of 1966, Congress substantially altered the provisions governing challenges to the appointment of a receiver. *See*, Pub. L. No. 89-695, ¶10(a), 80 Stat. 1028 (1966). Congress eliminated the prior administrative hearing, as well as the references to review under the APA on the weight of the evidence. In place of the Housing Act of 1954, Congress enacted the provisions authorizing ex parte appointments by the Bank Board. Congress, however, added §1464(d)(6)(A) (now codified at §1464(d)(2)(E)) authorizing the "action" to be decided "on the merits." Conspicuously absent from the amended statute was any reference to APA review. Congress likely deleted the provision allowing a thrift a hearing prior to the appointment of a receiver in exchange for granting the thrift a full hearing in the post-receivership action. This conclusion is further buttressed by Congress' refusal to incorporate the APA or APA standards of review into Section 1464 — references which were in both the statute's predecessor and accompanying amendments also adopted by Congress in 1966 to Section 1464. *See Bianchi & Co.*, 373 U.S. at 716 (explicit references to APA in legislative history supports conclusion review was on the agency record).

Three courts of appeals have now adopted the OTS' reading of the statute. *See, Franklin Savings; Woods v. FHLBB*, 826 F.2d 1400 (5th Cir. 1987) *cert. denied* 485 U.S. 959 (1988); and *Guaranty Savings &*

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challenging HHS disability determination). Here, by contrast, Congress has not so limited the "action" authorized by Section 1464 (d)(2)(E), and has instead authorized an action "on the merits."

Loan Association v. FHLBB, 794 F.2d 1339 (8th Cir. 1986). These courts have ignored both the compelling textual and historical considerations outlined above. Additionally, the courts have failed to adequately explain away Congress' use of the phrase "on the merits" to describe the scope of the district court's authority to decide the matter.

Where, as in §1464(d)(2)(E), Congress specifically addresses the form of the proceeding to be brought in federal district court, there should be no reason to go beyond that statute. Congress' command to adhere to the procedures set forth cannot be supplanted by the APA. *See, Chandler*, 425 U.S. at 861-62 n. 17. The review provisions of the APA and general principles of administrative law provide a fallback scheme where Congress provides for "review" but fails to delineate the appropriate standard of review. *See, National Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943); *Tagg Bros. & Morehead v. United States*, 280 U.S. 420, 443 (1930).

In *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), the Court held that de novo review under the APA "is authorized when the action is adjudicatory in nature and the agency factfinding procedures are inadequate."

This case falls squarely within the principles set forth in *Overton Park*. There can be little dispute that OTS' decision to appoint a receiver for a thrift is adjudicatory in nature. The agency's action is based on the facts unique to the savings and loan and limited to the particular institution. *See, Florida East Coast Ry. Co. v. United States*, 410 U.S. 224 (1973); *Londoner*, 210 U.S. 373 (1908). The OTS procedures for determining the need for a receiver are plainly inadequate for a full development of the record. First Federal is allowed no opportunity to present oral testimony or to test OTS' assessment through cross-examination. Nor is there any provision made for discovery. Indeed, OTS need not even accept communication or documentary evidence from or meet with the management of the thrift. An administrative scheme in which the agency retains unbridled discretion to dictate the extent of a party's participation and ability to present evidence cannot be considered an "adequate factfinding procedure" under *Citizens*. When an agency has the authority to proceed ex parte and unlimited discretion to define a party's ability to proffer evidence, as well as the unchecked authority to compile the record to justify its decision, it should come as no surprise that the record overwhelmingly

supports the agency's action. In any context — be it a criminal trial, civil trial, or administrative proceeding — one side's story of the version will be persuasive. Tested by the adversary process, the story is not likely to be as compelling.

The very purpose of procedural due process is to ensure fairness and accuracy by governmental decisionmakers. This Court has never upheld a scheme where a person is totally divested of a traditional property interest without any opportunity whatsoever to present evidence and challenge the contrary evidence. Yet the OTS has argued, and the courts of appeals have agreed, that Congress did just that in §1464(d)(2)(E), despite compelling textual and historical evidence to the contrary. This Court has repeatedly held that an ambiguous statute should be read to avoid deciding difficult constitutional issues. *See Gregory v. Ashcroft*, No. 90-50 (June 20, 1991); *Gomez v. United States*, 490 U.S. 858 (1989). This principle applies with special force where the constitutional issue arises only because of an unnatural reading of the statute and the constitutional power asserted — the total elimination of property in an ex parte proceeding — is wholly foreign to this Court's due process jurisprudence.

ARGUMENT III

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT IN THE CIRCUITS AS TO THE SCOPE OF REVIEW AND FORMS OF RELIEF AVAILABLE TO THE THRIFTS FACING SEIZURE DUE TO UNLAWFUL ABROGATION OF CONTRACTUAL OBLIGATIONS.

Petitioners need not await the appointment of a conservator or receiver before its contract abrogation, due process, and takings clause claims can be heard. Petitioners argued below that they were entitled to a pre-seizure opportunity to be heard because the post-deprivation remedy is wholly inadequate — it will cease to exist as a corporate entity under current OTS and RTC procedures.

The majority held that petitioner's constitutional objection to the absence of a pre-seizure hearing was not well taken. The court agreed that such a seizure and sale would be a draconian measure, but a constitutionally palatable one. In its view, if a receiver is wrongly appointed, petitioners can sue for money damages for the wrongful taking, relying on *First English Evangelical Lutheran Church v. City of*

Los Angeles, 482 U.S. 304, 318 (1987). The majority ruled, citing only circuit authority, that the Fifth Amendment does not require a district court to grant equitable relief for a wrongful taking; it only requires monetary compensation.

The majority nowhere discussed the grant of jurisdiction to federal saving associations to sue the Director for relief other than money damages. App. p. 26a. The dissent wrote that the majority's view essentially nullified the grant of jurisdiction to federal savings associations under 12 U.S.C. §1464(d)(1)(a). To Judge Contie, it would be anomalous for Congress to confer a special grant of jurisdiction on federal savings associations to sue the agency only *after* an entity is in receivership and facing immediate liquidation. *Id.* at 1361; App. p. 31a. Section 1464 (d)(1)(A) specifically granted First Federal jurisdiction to sue OTS concerning the regulations it promulgated pursuant to FIRREA, and the Bank need not be placed in receivership before such jurisdiction could be exercised. *Id.* at 1360-61; App. p. 31a.

In *Franklin Federal*, the majority thought that the evidence of Congressional intent was strong enough to "infer that Congress wanted to effect a taking." 927 F.2d at 134. In *Franklin*, the Court also decided that the thrift's only available remedy was just compensation, not equitable relief. *Id.* The Sixth Circuit has thus concluded that a seized financial institution is relegated exclusively to a money damages remedy in the event of a wrongful taking and abrogation of its contract rights. On the other hand the Federal Circuit, with jurisdiction over the Claims Court, has decided in *Far West*, 930 F.2d 883, that federal district courts *can* grant equitable relief, including rescission, for contract abrogation claims identical to those here. The Federal Circuit's decision is in accord with controlling precedent from this Court. Review is warranted to resolve this conflict in the circuits and decide this recurring issue of great importance.

The Sixth Circuit's interpretation that money damages is the exclusive remedy for the government's wrongful repudiation of a valid contract conflicts with *Far West*, and ignores the text of the statute. 12 U.S.C. §1464(d)(1)(A) and 12 U.S.C. §1819, the clauses that authorize suit against OTS and FDIC respectively, conferred traditional equitable jurisdiction on federal district courts to consider rescission claims. The Federal Circuit in *Far West* rejected the government's argument that money damages in the Claims Court is the only

available remedy for contract abrogation, because the government's construction would nullify 12 U.S.C. §1464(d)(1)(A). *Far West*, 930 F.2d at 891. *Far West* thus contradicts the majority's opinion that equitable relief for a wrongful appointment is unavailable to First Federal.

Far West's claims closely parallel those raised here. In 1987, when Far West Federal Bank was insolvent, FSLIC/FHLBB negotiated its recapitalization with an investor group. In that contract, the agencies agreed to forbear from enforcing regulatory capital requirements. After Thrift Bulletin 38-2 was issued, Far West sued for declaratory and injunctive relief from FIRREA requirements on the grounds that FIRREA had not superseded the conversion agreement. Far West further alleged that the Fifth Amendment prohibited the OTS from interfering with the performance of the conversion agreement. It sought rescission of the agreement and restitution of the invested funds and compensation for violation of Far West's Fifth Amendment due process rights. The district court granted preliminary injunctive relief. *See, Far West*, 738 F. Supp. 1565 (D. Ore. 1990).

The government moved to sever the rescission count of the complaint and transfer it to the Claims Court. Count IV of the plaintiff's complaint alleged:

> Application of the modified regulatory capital requirements and the specified accounting treatment of the credit facility are essential terms and conditions of the conversion agreement and in particular of the investors' agreement to recapitalize Far West. Should the Director of OTS and FDIC be correct that these contractual obligations were abrogated and superseded by enactment of FIRREA, that statute has effected a complete frustration of the conversion agreement, and a failure of the consideration for which the investment group bargained. In addition, FDIC will receive an unjustifiable windfall from the confiscation of the investment group's contributions.

Far West, 930 F.2d at 887.

In the Federal Circuit, the government argued that the Tucker Act impliedly forbids equitable relief on a contract claim against the United States. The Federal Circuit rejected this contention. The court opined that the large number of statutes containing "sue and be sued"

clauses reflect Congress' intent to extend a judicial remedy when governmental agencies enter into transactions with the public.

> Nor need we decide whether recovery might also be had in the Claims Court on Count IV, for such possibility does not defeat the jurisdiction of the district court under the statutory suability clauses. (*Id.* at 893).

The Sixth Circuit concluded that a federal district court may not grant equitable relief for a wrongful taking associated with the government's repudiation of its contracts.

Here, a remedy in the Claims Court would not fulfill the Fifth Amendment's guarantee of just compensation. The money damages remedy in these circumstances is inadequate. In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), this Court decisively rejected the government's claim that injunctive relief is unavailable for a wrongful taking. In that case, President Truman had seized steel mills to assure continued wartime production and avert a strike. The *Youngstown* court agreed that the federal government can be restrained from wrongful takings where money damages are inadequate. *See, also Hodel v. Irving*, 481 U.S. 704 (1987).

This Court should resolve the conflict between the Court of Appeals for the Federal Circuit and the Sixth Circuit as to the relief available on the contract abrogation and takings clause claims.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be issued and the case set for plenary review.

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July 25, 1991

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 90-1785

FIRST FEDERAL SAVINGS BANK AND TRUST, a federal savings bank; FIRST FEDERAL BANCORP, INC., a Delaware corporation; LAKELAND SERVICE CORPORATION, a Michigan corporation; and CITIZENS FEDERAL SAVINGS BANK, a federal savings bank,

Plaintiffs-Appellants.

v.

T. TIMOTHY RYAN, Director, Office of Thrift Supervision, in his own official capacity and as successor in interest to the Federal Home Loan Bank Board; FEDERAL HOME LOAN BANK OF INDIANAPOLIS; FEDERAL DEPOSIT INSURANCE CORPORATION, in its own capacity and as successor in interest to the Federal Savings and Loan Insurance Corporation,

Defendants-Appellees.

Argued Nov. 16, 1990

Decided March 12, 1991

Before KEITH and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

BOGGS, Circuit Judge.

BOGGS, Circuit Judge. First Federal Savings bank[1] feels that it responded to its country's call (albeit also with the hope of making a profit) by purchasing and merging with an insolvent Florida savings and loan. It did so with, at least in its own mind, certain understandings about the rules regarding the regulations governing the accounting treatment of the new entity. Since no good deed goes unpunished, the Office of Thrift Supervision ("OTS") (successor to the Federal Home Loan Bank Board ("FHLBB")) contends that recent statutory changes affect institutions such as First Federal that made deals with the Federal Savings and Loan Insurance Corporation ("FSLIC") and the FHLBB to take over failing institutions with understandings about the accounting treatment. The position of the OTS causes First Federal to believe that there is an immediate threat of adverse action--such as the appointment of a conservator or receiver. It has sought temporary relief barring regulators from exercising, at any time in the future, their general statutory powers to appoint a conservator or receiver for a financial institution when that institution's financial condition warrants it.

[1] First Federal Savings Bank and Trust is a federally-chartered savings and loan. First Federal Bancorp, Inc., a Delaware Corporation, is the parent corporation. Lakeland Financial Service Corporation is a wholly-owned subsidiary of First Federal. Citizens Federal Savings

The district court denied the requested relief and First Federal now appeals.[2] This case was briefed on an expedited basis so that it could be decided together with a companion case involving similar issues, *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision*, No. 90-5971.

We hold that the controversy is currently so amorphous and subject to so many contingencies that it is not now ripe for review. We also hold that First Federal has an adequate statutory remedy should such a conservator be appointed and that no other means of challenging a potential appointment is provided. Though we differ, in part, with the reasoning of the district court's opinion, we affirm the judgment of the court below.

I

In 1989, Congress passed the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA). FIRREA changed, in some quite important ways, the accounting conventions to be applied by thrifts in meeting various regulations involving capital structure. The requirements for capital structure themselves were changed as well. Additionally, FIRREA eliminated both the FSLIC and the FHLBB. The Act assigned their regulatory functions to the newly-created Office of Thrift Supervision (OTS) and their insurance functions to the Federal Deposit Insurance Corporation (FDIC), though now, as before, there is a degree of functional overlap.

First Federal claims that it relied to its detriment on the old regulatory policy by entering into a so-called "assisted

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Bank is a Florida thrift that is also a wholly-owned subsidiary of First Federal. The acquisition of Citizens is central to this litigation.

[2]The district court denied the request for a preliminary injunction but granted First Federal's request for a Temporary Restraining Order. On August 10, 1990, by a 2-1 vote, a panel of this court granted First Federal's motion for a stay pending appeal. Thus, though we rule against First Federal, it has received some breathing space during the course of this litigation.

transaction"--the acquisition of a financially troubled or insolvent thrift by a healthy thrift consummated with the approval and encouragement of the FSLIC and the FHLBB. These transactions were a part of the early regulatory response to the travails of the savings and loan industry. In our case, as in many of these situations, the idea was to merge a healthy thrift and an ailing thrift and create a single healthy institution. Unfortunately, the new rules for measuring whether an institution is healthy make First Federal seem sick. The crux of First Federal's complaint is that the OTS shouldn't be allowed to change the rules in the middle of the game.

This case (and the companion case, *Franklin Federal*) requires us to determine what effect the course change should have on adversely affected institutions and what, at this point, a federal district court can do appropriately about the bank's situation.

First Federal is federally chartered, and is located in Oakland County, Michigan, one of the wealthiest communities in the Midwest. First Federal began in business in 1934 as a federally-chartered mutual savings and loan association. Then, in September 1987, First Federal began operating as a federal stock savings bank. The parent corporation, First Federal Bancorp, which is chartered in Delaware, owns all outstanding First Federal Savings and Trust stock. First Federal Bancorp is now publicly held and traded on the American Stock Exchange.

Citizens Federal, a savings and loan located in Florida, became insolvent and was placed in receivership by the FHLBB. Instead of liquidating Citizens, the FSLIC, as receiver, decided to find a purchaser who might be able to save Citizens. In a transaction that it almost certainly now regrets, First Federal paid the FSLIC $500,000 to acquire Citizens. Like most business deals, it was supposed to help both parties. The FSLIC was spared the trouble and considerable expense of liquidating the assets and paying off the insured depositors. First Federal

hoped to turn Citizens into a profitable enterprise. Neither party wanted the transaction to fail and both believed that First Federal could succeed with Citizens.

The takeover of Citizens generated a number of documents. We use the general and neutral term "documents" advisedly, since the parties differ as to which of the documents constitute binding terms of whatever contract existed between First Federal on the one hand and the FSLIC and FHLBB on the other hand. At this point, we do not make any judgment regarding the legal effect, if any, of some of these documents. Instead, we simply list the important documents and briefly summarize their contents. We will divide these documents into two categories: documents communicated to First Federal by the FSLIC or entered into between First Federal and the FSLIC (whatever the case may be) and those communicated to First Federal by the FHLBB or entered into between First Federal and the FHLBB (again, whatever the case may be).

FSLIC Documents:

Assistance Agreement. This agreement, dated September 1, 1988, completed the transaction to acquire Citizens. This agreement contained the terms of the sale itself--how much First Federal would pay, details of allocating tax benefits, indemnification agreements, etc. The only term of this agreement that might be relevant provides for the use of accounting principles "in effect on the Effective Date or as subsequently clarified or interpreted by the Bank Board or the Financial Accounting Standards Board ("FASB") or any successor organization of the American Institute of Certified Public Accountants, respectively." The agreement also stated that "[t]he rights, powers, and remedies given to the parties by this agreement shall be in addition to all rights, powers, and remedies given by any applicable statute or rule of law. Any forbearance, failure, or delay by any party in exercising or partially exercising such right, power, or remedy shall not preclude its further exercise."

Otherwise, the details of this agreement are not important or relevant to this litigation.

Merger Agreement and Plan of Merger. This agreement facilitated that actual takeover of Citizens itself. It created a new corporate entity--"New Citizens"--that then agreed to merge into "Old Citizens." The terms of this agreement are not relevant to this litigation.

Regulatory Capital Maintenance Dividend Agreement. This agreement governed First Federal's obligations to meet regulatory capital requirements and was dated September 1, 1988. First Federal agreed to "maintain the Institution's [Citizens'] Regulatory Capital in compliance with the Regulatory Capital Requirement and the limitations imposed by Section IV of this Agreement . . . ." Further, First Federal promised to maintain the regulatory capital of Citizens at or above the regulatory capital requirement and to infuse its own capital as necessary in order to meet the regulatory capital requirements within one quarter after discovery of the deficit.[3] The agreement defined Regulatory Capital as "the institution's regulatory capital requirement at a given time computed in accordance with 12 C.F.R. §563.13(b), or any successor regulation thereto, except to the extent that the Board [FHLBB] has agreed to forbear." However, the agreement also provided that "[a]ll references to regulations of the Board or the FSLIC used in this Agreement shall include any successor regulation thereto, it being expressly understood that subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquirer's obligation under this agreement."

The OTS contends that the provisions of these three agreements between the FSLIC and First Federal are the

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[3]The Agreement provided for one exception to this general rule: First Federal was not required to infuse capital to meet the regulatory capital requirement for the quarter immediately preceding the acquisition.

only documents creating binding obligations between it, as successor to the FSLIC and the FHLBB, and First Federal. Moreover, the OTS also maintains that the disclaimers in the "Assistance Agreement" and the "Regulatory Capital Maintenance Dividend Agreement" constitute express reservations by the FSLIC of the general regulatory power of the FHLBB to make any regulatory changes of general applicability regardless of any effect that such changes might have on First Federal's profitability under the agreement. First Federal claims that it would never have entered into the deal had it then understood the government's position to be as it is now stated. The OTS's response is basically *caveat emptor*: if you do business in a highly regulated industry, you must assume the risk of having regulations changed.

FHLBB Documents:

Federal Home Loan Bank Board Approval of the Supervisory Conversion and Merger. In this document, the FHLBB approved the merger of Old Citizens and New Citizens, thereby allowing the takeover by First Federal. In order to facilitate this takeover, the FHLBB allowed Citizens to convert from the mutual form of ownership to the stock form. This document specified that "in accounting for the acquisition and Merger, the Holding Company and New Citizens shall use generally accepted accounting principles prevailing in the savings and loan industry, as accepted, modified, clarified, or interpreted by applicable regulations of the bank board and the FSLIC."

Implementing Resolution. This resolution of the FHLBB, dated September 2, 1988, gave the final go-ahead to execute the transaction to the FSLIC and to subordinate FHLBB officials.

Forbearance Letter. This letter, from the Federal Home Loan Bank, dated September 1, 1988, stated that, because First Federal's takeover of Citizens was "instituted for supervisory reasons" the FHLBB would

forbear from enforcing various regulatory capital requirements for periods ranging from one to five years.

First Federal contends in its brief that all of these documents constituted agreements now binding on the OTS and that the agreements, taken together, allow it to recognize so-called "supervisory goodwill" acquired in the transaction as an intangible asset in measuring its compliance with capital requirements.[4] The OTS argues that the statements from the FHLBB constituted nonbinding statements of regulatory intent rather than agreements from the FHLBB. In order for First Federal to prevail, we would have to be convinced, at the very least, that communications from the FHLBB constituted parts of a binding agreement.

Even so, the terms of that agreement would not be totally unambiguous. It is true that First Federal's proposal to the FSLIC and FHLBB contains a provision that addresses the amortization of supervisory goodwill. However, this provision was not incorporated into any of the agreements between First Federal and the FSLIC. Neither the Assistance Agreement, the Merger Agreement nor the Regulatory Capital Maintenance/Dividend agreement refers explicitly to the amortization of supervisory goodwill. The FHLBB was similarly silent on this important issue. The FHLBB gave its approval of the supervisory conversion and merger and passed an implementing resolution. The FHLBB also provided a forbearance letter, but that letter has no provisions that

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[4] Supervisory goodwill is an accounting construct that has recently come under fire. At the time of acquisition, the books of an insolvent thrift are balanced. An insolvent thrift will, by definition, have fewer assets than liabilities. The difference between assets and liabilities is calculated and carried on the books of the new entity as an "asset"--supervisory goodwill. Under this accounting system, a greater net liability simply means that the thrift has more supervisory goodwill. Thus, the deeper an insolvent savings and loan is in the hole, the greater the amount of supervisory goodwill that an acquiring thrift will be allowed to carry on the books as an asset. Over a period of years, the new thrift writes off the supervisory goodwill, eventually reducing the amount of this "asset" to zero.

refer explicitly to the issue of supervisory goodwill.

There is, nonetheless, some evidence from which one might infer that the agreement contemplated a particular accounting treatment of supervisory goodwill. The FHLBB Approval of the conversion does provide for the use of Generally Accepted Accounting Principles (GAAP). Though no evidence regarding the requirements of GAAP is in the record before us on appeal, we conclude, based solely on the statements of the parties, that GAAP would generally allow the use of supervisory goodwill.[5] And it is not disputed that, at the time of the transaction, applicable statutes and FHLBB regulations would have allowed much greater use of supervisory goodwill to meet regulatory capital requirements. Thus, we would have a difficult time in resolving the merits of this dispute based on the record at hand.

II

In August 1989, not quite a year after the consummation of these agreements among First Federal, Citizens, the FSLIC, and the FHLBB, Congress passed FIRREA. FIRREA abolished the FSLIC and FHLBB and tightened up the capital requirements for savings and loans. FIRREA also required the Director of the OTS to prescribe new capital standards for savings and loans. 12 U.S.C. §1464(t)(1). Additionally, savings and loans must meet core capital requirements amounting to not less than three percent of the institution's total asset base. 12 U.S.C. §1464(t)(2)(A). Most importantly, the new scheme also phases out the use of supervisory goodwill in order to calculate core capital. By January 1, 1995, supervisory goodwill cannot be counted at all toward core capital. 12 U.S.C. §1464(t)(3)(A). In addition, the period over which supervisory goodwill can be amortized has been limited to twenty years. 12 U.S.C.

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[5]Of course, GAAP has nothing to say about meeting *regulatory* requirements, as distinct from calculating one's balance sheet.

§1464(t)(9)(B).[6] Following the congressional mandate, the OTS has issued regulations that further restructure the capital requirements for institutions that it regulates. The most important of the new regulations, for our purposes, requires consolidated reporting for parents and subsidiaries in meeting capital requirements. Accordingly, First Federal must treat itself and Citizens as one entity for accounting purposes. Moreover, the OTS has indicated, in Thrift Bulletin 38-2, that it is the position of the OTS that new capital standards affect *all* thrift institutions--including those institutions that previously asked for and received forbearances from the FHLBB. Thus, the position of the OTS is that FIRREA has rescinded *all* regulatory forbearances approved by the FHLBB.

In the wake of its acquisition of Citizens, First Federal has not been able to meet the new requirements. In November 1989, the OTS presented First Federal with a supervisory directive. This required First Federal to refrain from making or amending any commercial loans, from giving overdrafts on its commercial lending accounts, and required an audit of the commercial lending department. First Federal has followed this directive.

The OTS also required First Federal to present a new capital plan in January 1990. Under First Federal's suggested capital plan, it would have met the new standards within five years. In a letter to First Federal, the OTS rejected the plan, in what First Federal has characterized as "conclusory" language. First Federal believes that the position of the OTS is too intransigent and inflexible and it cites a number of slights to support this contention. For example, First Federal indicates that the representatives of the OTS with whom they have had contact have indicated they the OTS will, in the near future, seek to appoint a conservator or receiver for First

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[6]This limitation may increase the amount of the "asset" that must be removed from the books each year, and thus creates the need for additional capital infusions.

Federal. According to First Federal, a representative of the OTS even went so far as to say something to the effect of "you're dead already, so why fight it" at a negotiating session.

But what bothers First Federal the most is the OTS position regarding loan loss reserves. It is here that First Federal believes that the OTS has been particularly heavy-handed. First Federal has not experienced high loan losses in the past. From fiscal 1985 to 1989, First Federal experienced less than $500,000 in total loan losses. In March 1990, the OTS requested that First Federal increase its loan loss reserves to $6.1 million. It did so. Then, on June 29, 1990, the OTS again requested increased loan loss reserves, this time to $16 million. A short time later, on July 3, the OTS again upped its recommended reserve amount, this time to $27.5 million. First Federal claims that $8 million would be an appropriate loan loss reserve. Although First Federal seems displeased about these requests, the proper amount of loan loss reserves are not before us in this appeal. Though the OTS has undoubtedly made these requests, it has done so informally. Consequently, there is no final agency action subject to appellate review. *See generally Greater Cincinnati Chamber of Commerce v. United States Environmental Protection Agency*, 879 F.2d 1379 (6th Cir. 1989).

Unsurprisingly, the OTS has a different explanation for its vigor. The OTS contends that FIRREA constitutes a clear congressional mandate ordering the OTS to enforce capital requirements firmly. Moreover, the OTS indicates that no decision regarding First Federal has yet been reached.

This litany of contention between the OTS and First Federal is, for the most part, irrelevant to the outcome of this dispute. We discuss it, however, because it is relevant to threshold issues that we must address prior to reaching the merits. It is because of its ongoing difficulties with the OTS that First Federal believes that

the OTS is on the brink of appointing a conservator or receiver. As a result of this fear, First Federal filed a five-count complaint against the OTS on July 3, 1990.

In count I, First Federal alleged that the OTS could not appoint a conservator or receiver because First Federal did not meet the criteria set out in 12 U.S.C. §1464(d)(2)(E), the statutory provision relating to the appointment of a conservator or receiver. In count II, First Federal alleged that the OTS's rejection of the capital plan filed pursuant to 12 C.F.R. §567.10 was arbitrary and capricious. In count III, First Federal claimed that it had a contract with the FHLBB and the FSLIC and that the changes instituted in FIRREA frustrate the purpose of the contract, thereby entitling First Federal to recission of its agreement with the FSLIC and FHLBB. Count IV of the complaint alleged that the provisions allowing the Director of the OTS to appoint a conservator or receiver without prior judicial review violate First Federal's due process rights. Count V alleged that the provisions allowing appointment of a conservator or receiver would constitute an unconstitutional taking of property (*i.e.* property rights under its contract with the government) without just compensation. In its prayer for relief, First Federal asked for, *inter alia*, an order restraining the OTS from appointing a conservator or receiver.

The district court, after an *ex parte* hearing, granted First Federal a temporary restraining order (TRO) prohibiting the OTS from appointing a conservator or receiver for First Federal. First Federal then moved for a preliminary injunction. The judge denied the preliminary injunction but did extend the TRO to give First Federal time to appeal. First Federal then filed an interlocutory appeal pursuant to 28 U.S.C. §1292(a)(1). This court granted a stay pending appeal which had the effect of restraining the OTS from appointing a conservator or receiver.

The OTS argued below that 12 U.S.C. §1464(d)(2)(E) deprives any district court of jurisdiction to consider an injunction against the appointment of a receiver and that the dispute was not sufficiently ripe for review. First Federal argues, in response, that the provisions of 12 U.S.C. §1464 simply do not address the case at hand, and, moreover, that denying it the right to challenge the appointment of a conservator or receiver in advance constitutes a denial of property without due process.

III

In order for a court to issue an injunction against a regulatory agency, the dispute must be "ripe" for review. The district court concluded that, because the OTS had denied a capital plan submitted by First Federal, the dispute was ripe for review but denied the injunction anyway because the court did not have jurisdiction.[7] This is an interlocutory appeal of the denial of a request for a preliminary injunction. No final judgment has been entered in this case and the district court took no action regarding the denied capital plan. Further, the only issues briefed for appeal have to do with the propriety of enjoining the appointment of a conservator or receiver. Thus, the dispute before us in *this* appeal concerns only the propriety of granting an injunction against the appointment of a conservator or receiver. We believe that the district court framed the issue before it with insufficient particularity. Because of the procedural posture of this case, (an interlocutory appeal of denial of a preliminary injunction) we consider only whether a pre-appointment challenge to the appointment of a conservator or receiver is ripe for review.

The Supreme Court outlined the ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), and two companion cases, *Toilet Goods Association, Inc.*

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[7]We were informed at oral argument that a second capital plan submitted by First Federal has, like the first, been rejected by the OTS.

v. Gardner, 387 U.S. 158 (1967) and *Gardner v. Toilet Goods Association, Inc.*, 387 U.S. 167 (1967). The rationale of the ripeness doctrine is relatively straightforward:

> The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution. Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Laboratories, 387 U.S. at 148-49. In applying this rationale, the Supreme Court explained that the ripeness requirement turns on two factors: "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 148.

Thus, we begin our analysis of ripeness by determining whether the issue in this case is fit for judicial decision. In *Abbott Laboratories*, Congress had passed a law requiring manufacturers of prescription drugs to provide the generic name of a drug when the proprietary name was used. *Id.* at 137-38. The Commissioner of Food and Drugs promulgated regulations requiring the generic name to be printed alongside the proprietary name every time the proprietary name was used--in advertisements or other printed materials, as well as on the label. *Id.* at 138-39. Several manufacturers challenged the regulation, on the grounds that the Secretary had exceeded the scope of his

authority. *Id.* at 139. In deciding that the regulations at issue in *Abbott Laboratories were* fit for judicial resolution, prior to actual enforcement, the Supreme Court began by noting that "all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner to require the established name of the drug to be used *every time* the proprietary name is employed." *Id.* at 149. In *Abbott Laboratories*, then, the plaintiffs could challenge the regulation because the challenge involved only the authority of a particular official to promulgate a particular regulation. Once the regulation was found to be either legal or illegal, there were no questions regarding its application to the particular plaintiff's products.

In *Abbott Laboratories*, the decision of the purely legal issues resolved the dispute. Here, by contrast, resolution of legal issues would barely begin to resolve the dispute. It is true that a few of the issues addressed by the court might be considered purely legal--for example, whether Congress intended FIRREA to require the abrogation of agreements involving assisted transactions and, if so, whether that would always constitute a taking. However, those issues would not be dispositive. Other intensely factual issues would remain before the court could decide the dispute. A savings and loan might be solvent under one set of possibly applicable accounting procedures or regulatory requirements but not another. Alternatively, a savings and loan might be solvent (or insolvent) under any possibly applicable accounting procedures or regulatory requirments. Whatever the case might be, the court must make a factual determination as to the financial status of the savings and loan. It is only at the time of an enforcement action that the relevant facts will be fully developed.

To be sure, First Federal may be one of those banks where decision of the legal issues *would*, for all practical purposes, be dispositive. There is every indication that appointment of a conservator or receiver would, at this time, be wrong under the old regulatory scheme and

possibly acceptable under the new. The point is, though, that making this determination requires us to go beyond the legal issues and look to the facts of the particular case before us--exactly what the courts did not have to do in *Abbott Laboratories*.

Furthermore, we note that First Federal's purpose in seeking a preliminary injunction is the eventual establishment of a permanent injunction. While, at this time, it appears that First Federal would not be in financial difficulties absent the new regulations, we have no way of knowing what the future will bring. First Federal could, in the future, become either financially stronger or weaker, so that the appropriateness of appointing a conservator or receiver would not depend solely on the applicability of new FIRREA requirements. Thus, any factual determination that a court might make prior to the appointment of a conservator or receiver could become outdated.

In response to these arguments, First Federal relies almost entirely on a district court case from the District for the District of Columbia, *Olympic Federal Savings and Loan Association v. Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990), *appeal dismissed as moot*, ___ F. 2d ___ (D.C. Cir. 1990). In *Olympic Federal*, the court, in a very cursory opinion, concluded that the dispute between Olympic Federal and the OTS was ripe for review. However, based on the nature of the plaintiff's complaint, we do not believe that the *Olympic Federal* court's analysis on this particular point is inconsistent with our own. In that case, the plaintiffs sought to enjoin the Director of the OTS from appointing a conservator or receiver arguing that the Director himself had been appointed in violation of the Appointments Clause of the Constitution and that the regulations changing capital requirements were issued in violation of the requirements of the Administrative Procedure Act. *Id.* at 1184-85. We agree with the OTS that *Olympic Federal* is distinguishable on its facts. As the *Olympic Federal* court noted, the dispute in that case involved

purely legal issues and events that had already transpired. *Id.* at 1187. If the Director's appointment had been illegal, he would have no power ever to appoint a conservator or receiver; if regulations were themselves invalid, they could never apply to the plaintiff. The claim launched by the plaintiffs in our case is quite different, as it requires the court to resolve both legal and factual issues. Moreover, while some events at issue in our case have already taken place, one critical fact--the financial status of First Federal--is subject to change, possibly quite unexpected or radical change.

The court in *Abbott Laboratories* also noted that the regulations at issue in that case constituted "final agency action." *Abbott Laboratories*, 387 U.S. at 149-50. The appointment of a conservator or receiver would constitute final agency action only once the appointment took place, not before. Mere contemplation of a course of action does not constitute a final agency action. However, it is undisputed that no conservator or receiver has yet been appointed. There is just no way that we can be sure, as of now, that the OTS will *ever* choose to appoint a conservator or receiver, or the circumstances under which it would do so.

Nor do we find that withholding judicial review would constitute an undue hardship upon the parties. First Federal believes that it would be better off if the OTS were enjoined from appointing a conservator or receiver. This is undoubtedly an accurate view. First Federal may indeed be in an uncomfortable position--akin, perhaps, to a prisoner positioned face down on the guillotine, waiting for the executioner to pull the handle and loose the blade at any moment. However, we believe that this does not constitute undue hardship as the Supreme Court has applied and defined the term. The Supreme Court found that the regulations at issue in *Abbott Laboratories* did create an undue hardship but only because the regulations had "a direct effect on the day-to-day business of all prescription drug companies . . . ." *Id.* at 152.

We believe that this case is analogous to one of *Abbott Laboratories*' companion cases, *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967). In *Toilet Goods*, the Supreme Court considered a regulation providing that the Commissioner of Food and Drugs could suspend certification of any manufacturer upon finding that the manufacturer had refused to permit inspectors adequate access to manufacturing facilities. *Id.* at 161. Finding that the regulation was not ripe for review, the Supreme Court observed that "[t]he regulation serves notice only the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order." *Id.* at 163 (emphasis in original). In *Abbott Laboratories*, on the other hand, the company was faced with a choice of obeying the regulation--thereby expending a great deal of money--or disobeying the regulation in order to challenge it and facing the possibility of harsh civil or even criminal penalties. *Abbott Laboratories*, 387 U.S. at 152. That is, the regulation at issue in *Abbott Laboratories* affected the company's "primary conduct." *Toilet Goods* at 163.

As we have previously explained, a dispute is not ripe unless the agency action at issue imposes some type of affirmative duty or burden of compliance upon the party seeking to challenge the action. *Production Credit Association v. Farm Credit Administration*, 846 F.2d 373, 375 (6th Cir. 1988). Here, First Federal (or its officers) may feel nervous about the possibility of the appointment of a conservator or receiver. This risk, though personally uncomfortable, does not affect its behavior in any legally cognizable sense. That is, the threat of taking over the bank would not place First Federal in the kind of dilemma faced by the company in *Abbott Laboratories*. It need not make any investments or take any actions to meet regulatory requirements.

On this issue, as on the first, First Federal relies on *Olympic Federal*. In that case, the district court concluded that the plaintiff would suffer a hardship without review because the OTS could appoint a conservator or receiver at any time and without notice, either to the plaintiff or to a court. *Olympic Federal*, 732 F. Supp. at 1187. Here, we differ from the D.C. District because we believe the court mischaracterized the *Abbott Laboratories* test. The whole point of *Abbott Laboratories* was that the regulations *already* affected the plaintiffs because the regulations were presumptively binding upon the plaintiffs once the regulations had become effective. The focus of that test is on the consequences of agency action even absent enforcement action, not on the deleterious effect of possible future enforcement action itself. Any other interpretation would render the ripeness requirement meaningless, since a party would, if it believes that its challenge will succeed, almost always prefer to have a judgment sooner rather than later. Further, as we discuss below, we believe that the statutory provisions for review of the appointment of a receiver meet the standards of due process and Article III of the Constitution.

Moreover, a dispute is not ripe for review unless it meets both prongs of the ripeness test. *Production Credit*, 846 F.2d at 374. Thus, a dispute must be fit for review *and* withholding review must impose hardship of a specific variety on the party seeking to challenge the agency action. Accordingly, as we believe that neither prong of the ripeness test has been satisfied, we conclude that the dispute between First Federal and the OTS is not ripe for review.

IV

The OTS also argues that the provisions relating to challenging the actions of conservators or receivers appointed by the Director preclude review. The statute does not speak directly to the issue of whether the courts can enjoin the appointment of a conservator or receiver

prior to the Director's action. Thus, we must analyze the structure of the statutory scheme and determine the result that is most consistent with it. There are two relevant provisions. 12 U.S.C. §1464(d)(2)(E) provides that "[t]he director shall have exclusive power and jurisdiction to appoint a conservator or receiver for a Federal savings association . . . . [T]he association may, within 30 days thereafter, bring an action in the United States district court . . . for an order requiring the Director to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Director to remove such conservator or receiver." Subsection (G) is an anti-injunction provision, stating that "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver or, except at the request of the Director, to restrain or affect the exercise of powers or functions of a conservator or receiver."

We must rule on the combined effect of these two provisions. The OTS contends that these provisions, taken together, deprive any court of jurisdiction to address the propriety of appointing of a conservator or receiver prior to the time that the Director chooses to appoint one. The language of 12 U.S.C. §1464(d)(2)(E) specifically gives the Director of the OTS "exclusive power and jurisdiction to appoint a conservator or receiver . . . ." This Congressional granting of authority to the Director of the OTS would be essentially meaningless if any thrift could run to the nearest federal court and get an injunction upon the potential threat of having a conservator or receiver appointed. Once granted, an injunction would preclude the Director of the OTS from appointing an conservator or receiver without first getting permission from a federal court.[8] Congress chose to grant a

[8]We conclude that the interpretation advanced by First Federal would be counterproductive, even from the point of view of savings and loans generally, because it would give the OTS an incentive to ambush banks by surprise rather than giving them some type of opportunity to defend themselves. In effect, we would punish the OTS for letting troubled savings and loans know that the OTS suspected trouble.

particular power to an executive-branch official. Allowing this type of injunction would essentially repeal that decision, thereby totally undermining the statutory allocation of authority.

Obviously, Congress could have allowed the Director of the OTS to appoint a conservator or receiver only after petitioning a court to do so. However, Congress chose instead to limit judicial review to a specific period of time--thirty days after the appointment of a conservator or receiver. First Federal claims that this provision "is silent" regarding pre-appointment judicial review. However, the language of the statute provides for review "[i]n the event of such appointment" within a thirty-day period. 14 U.S.C. §1464(d)(2)(E). To us, that suggests that review is only available after a conservator or receiver has been appointed.

Subsection (G), the anti-injunction provision, lends further support to this conclusion. This section prevents the courts from interfering with the actions of a conservator or receiver, except if the court removes the conservator or receiver pursuant to subsection (E). We believe that the OTS is correct, and that interpreting these provisions to limit injunctions after the appointment of a receiver but to allow such injunctions prior to the appointment of the receiver would render the anti-injunction provision nugatory.

First Federal maintains that this interpretation of the statutory scheme is precluded by the Supreme Court's recent decision in *Coit Independent Joint Venture v. Federal Savings & Loan*, ___ U.S. ___, 109 S. Ct. 1361 (1989). Actually, *Coit* has little to say about our case. And, to the extent that *Coit* does say something about our case, it supports the OTS.

In *Coit*, the plaintiff filed a state-law claim against a savings and loan. *Id.* at ___, 109 S. Ct. at 1365. Two months after the suit was filed, the FHLBB determined that the defendant savings and loan was insolvent and

appointed the FSLIC as a receiver. *Ibid.* The FSLIC argued that statutory provisions in the Financial Institutions Supervisory Act of 1966 (FISA) virtually identical to those at issue in this case gave it exclusive jurisdiction to adjudicate state-law claims. *Id.* at ___, 109 S. Ct. at 1366. The Fifth Circuit had previously held that the statute did give the FSLIC exclusive jurisdiction to adjudicate state-law claims against banks in receivership. In particular, the Fifth Circuit relied on the anti-injunction provision of FISA. *Id.* at ___, 109 S. Ct. at 1367.

The Supreme Court ruled, in *Coit*, that the statute did not give the FSLIC any jurisdiction to adjudicate state-law claims. As the Supreme Court explained, "Congress granted FSLIC various powers in its capacity as receiver, but they do not include the power to adjudicate creditors' claims." *Id.* at ___, 109 S. Ct. 1368. In so doing, the Supreme Court relied both on the nature of the "essential functions" of the receiver and upon the "plain language" of the statutory scheme. *Ibid.* The Court also noted that the anti-injunction language "does not add adjudication of creditor claims to FSLIC's receivership powers. It simply prohibits courts from restraining or affecting FSLIC's exercise of those receivership 'powers and functions' that have been granted by other statutory sources." *Id.* at ___, 109 S. Ct. at 1369.

We do not see how *Coit* supports First Federal's arguments. In *Coit*, the Fifth Circuit had ruled, based on its own precedent, that the federal courts lacked subject matter jurisdiction to rule on a claim brought by a third party against a bank in receivership. Here, by contrast, we decide an issue relating to the power of the OTS to initiate enforcement action against an entity clearly within its regulatory domain. Accordingly, we believe that the Supreme Court's analysis of the statutory scheme in *Coit* is consistent with our conclusion. As we have already noted, the statute does grant the OTS the power and function of deciding whether to appoint a conservator or receiver.

Further, the Supreme Court analyzed the "statutory context" of the provision in order to determine that the Fifth Circuit's interpretation was flawed. *Ibid.* In so doing, the Court explained that the anti-injunction provision was designed to "prohibit untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions." *Ibid.* We find this language significant. Though the Supreme Court did not explain exactly what would constitute an "untimely challenge," we believe that the Court would be best understood as referring to *exactly* the type of challenge launched by First Federal.

Moreover, the Supreme Court also relied on the "practical effects of court adjudication on the receivership process." *Id.* at ___, 109 S. Ct. at 1370. The Supreme Court found that the possible delays caused by the litigation there would not undermine the liquidation process. Again, our case is totally inapposite. By allowing any federal district court to entertain a motion for an injunction when the OTS is only contemplating the possibility of appointing a conservator or receiver, the OTS is prevented from even initiating the process. Its ability to preserve assets in the face of insolvency, whether caused by corruption, mismanagement, or just plain bad luck would be significantly undermined if courts could enter injunctions that would prevent the appointment of a conservator or receiver without prior permission of a court. The only purpose that we can see for giving the Director the power to appoint a conservator or receiver without prior permission in the first place is to free the OTS of having to get permission of a court before acting. First Federal's position would, in effect, allow an endangered thrift to launch a preemptive strike against the OTS after a mere hint that the OTS was contemplating the appointment of a receiver. This we decline to permit.

V

We have concluded that First Federal's claim was not ripe for review and that the statutory scheme deprives the

federal courts of jurisdiction to consider pre-appointment challenges to the appointment of a conservator or receiver. Normally, this would be the end of the opinion. However, First Federal also maintains that denial of pre-appointment review constitutes a denial of its due process rights and also violates Article III of the United States Constitution. Such arguments, if persuasive, might convince us to reexamine our conclusions on jurisdiction and ripeness. Accordingly, we now move to First Federal's constitutional arguments.

A

First Federal argues that allowing the Director to appoint a conservator or receiver *ex parte* without any prior hearing either by a court or an administrative body violates its right to procedural due process. The Supreme Court affirmed the constitutionality of a provision substantially similar to the one at issue here over forty years ago, in 1947. *See Fahey v. Mallonee*, 332 U.S. 245 (1947). There, the Supreme Court held that a post-deprivation hearing was adequate, in that particular case, to meet due process requirements. *Id.* at 253.

While we agree with the OTS that the provisions at issue do not violate procedural due process, we do not rest our analysis solely on *Fahey*. We believe that due process doctrine has developed during the interval of over forty years from *Fahey* to today so that our task is not completed by cursory reference to *Fahey*. We consider here only the constitutional validity of denying a pre-appointment hearing, not of the anti-injunction provision as generally applied. At this point, we do not speak definitively to the meaning of the anti-injunction provision. It may be that the provision would still give a court some latitude to issue a stay merely in aid of its own jurisdiction prior to ruling on the merits. As we believe that the result is the same in any event, we will proceed on the assumption that First Federal's harsh interpretation of the anti-injunction clause is accurate.

First Federal maintains that the appointment of a conservator or receiver is equivalent to seizure of its property by the government without any hearing. We think that this is stretching a little, but we will, for now, assume *arguendo* the correctness of First Federal's position on this point. It is well established that the government can, under certain circumstances, seize property outright without a prior hearing. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678 (1974). Obviously, the conclusion that seizure of property is justified without a pre-deprivation hearing is not lightly reached. The government has been allowed to initiate the seizure of property without a prior hearing under certain very limited circumstances:

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the States has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Fuentes v. Shevin, 407 U.S. 67, 91 (1972). We believe that this situation meets this three-prong test. First, the safety of the banking system is generally considered to be an important governmental or public interest. In this country, it has long been established that the banking system is subject to government regulation and protection in the interest of economic stability. It is well established that banks or savings and loans can legitimately be placed under the control of a conservator or receiver without a hearing prior to the action. *See Coffin Bros. & Co. v. Bennett*, 277 U.S. 29 (1928). Second, the insolvent savings and loan is one of the classic situations in which prompt action is necessary. Third, the statute specifically limits the authority to determine whether to appoint a

conservator or receiver to one official--the Director of the OTS.

Nonetheless, First Federal argues that it is entitled to a hearing because its post-deprivation remedy is not adequate. First Federal claims that the current practice of the OTS is to solicit secret bids, appoint the Resolution Trust Corporation (RTC) as a receiver on a Friday, balance the books over the weekend and execute the sale and open, under the aegis of a new institution, on Monday. Assuming that First Federal's account is accurate, we agree that this is a draconian measure. However, we believe that it is a constitutionally acceptable one. In the event of wrongful appointment of a receiver, First Federal could sue for all damages arising out of the wrongful appointment. *See First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 318 (1987). The fifth amendment only requires that a party be compensated for a wrongful taking; it does not require federal courts to provide equitable relief preventing such takings. *Anchor Pointe Boat-A-Minium Association, Inc. v. Meinke*, 860 F.2d 215, 218 (6th Cir. 1988). In addition, even given the anti-injunction provision, 12 U.S.C. §1464(d)(2)(G), a district court may, if the evidence is sufficiently strong and clear to convince the court on the merits, immediately remove a conservator or receiver under 12 U.S.C. §1464(d)(2)(E).

B

First Federal also claims that allowing the Director of the OTS to appoint a conservator or receiver without a prior judicial hearing violates the provisions of Article III of the United States Constitution. First Federal relies on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), for support. If we believed that FIRREA assigned adjudicative functions to administrative officials, we would have to explore one of the most complex and difficult areas of constitutional law. We would obviously have to consider *Northern Pipeline*,

as well as the more recently decided *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

We are spared the necessity of reaching these difficult issues, however, as we are convinced that the appointment of a conservator or receiver is not a "judicial power" subject to Article III of the United States Constitution. We believe that the power given to the Director to appoint a conservator or receiver is an executive power. Moreover, as with many administrative actions, the decision is subject to review by an Article III court within thirty days of the appointment. Accordingly, we reject First Federal's claims.

VI

For the above reasons, the United States District Court for the Eastern District of Michigan's denial of a preliminary injunction is **AFFIRMED**. We do this without prejudice to any possible future claim that may be raised by First Federal.

CONTIE, Senior Circuit Judge. For the following reasons, I concur in part and dissent in part. I concur in the majority's conclusion that the proper amount of loan loss reserves is not before us in this appeal. Although First Federal believes that the amount is not proper and is "unfair," it advances no legal theory in its brief for this proposition. I also agree with the majority that the broad injunction requested by appellant barring the appointment of a receiver in any instance is not ripe for judicial review. Under FIRREA, there are ten reasons articulated for the appointment of a receiver, 12 U.S.C. §§1464(d)(2)(A) and (B), and we cannot know in advance what events will transpire.

However, I believe that one of the issues First Federal raises is ripe for judicial review.[1] In count III of its complaint, First Federal contends that OTS's enforcement of its regulations has abrogated First Federal's prior contract with the FHLBB concerning the treatment of supervisory goodwill[2] in violation of an express savings provision of FIRREA, Section 401(g), which states:

> (g) SAVINGS PROVISIONS RELATING TO FHLBB.-
>
> (1) EXISTING RIGHTS, DUTIES, AND OBLIGATIONS NOT AFFECTED.--
>
> Subsection (a) shall not affect the validity of any right, duty, or obligation of the United States, the Federal Home Loan Bank Board, or any other person, which--
>
> (A) arises under or pursuant to the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933, or any other provision of law applicable with respect to such Board (other than title IV of the National Housing Act); and
>
> (B) existed on the day before the date of the enactment of this Act.

---

[1] In the companion case, *Franklin Federal Savings Bank v. Director, Office of Thrift Supervision* (Case No. 90-5971), the district court reviewed the same issue in a request for declaratory judgment. However, the majority did not dispose of Franklin Federal's claim on ripeness or jurisdictional grounds. I believe this is inconsistent.

[2] Specifically, First Federal alleges that it was invited and urged by FSLIC and FHLBB to acquire the insolvent thrift, Capital Federal Savings and Loan Association. First Federal alleges that it was promised specific capital forbearances and accounting treatment, allowing the supervisory goodwill created by the Citizen's acquisition to be included in its capital requirements.

I believe the district court had the authority to consider the merits of this issue under section 1464(d)(1)(A) of FIRREA, which provides in pertinent part:

> The Director shall have power to enforce this section, section 8 of the Federal Deposit Insurance Act, and regulations prescribed hereunder. . . . Except as otherwise provided, the Director shall be subject to suit (other than suits on claims for money damages) by any Federal savings association or director or officer thereof with respect to any matter under this section or any other applicable law, *or regulation thereunder*, in the United States district court for the judicial district in which the savings association's home office is located . . . .

(emphasis added).

I disagree with the majority's conclusion that *Abbott Labs* and its companion cases bar consideration of this issue on ripeness grounds. The Supreme Court in *Abbott Labs* considered whether a claim brought pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §705, was ripe for judicial review. 387 U.S. at 140-41. In the present case, plaintiff is not suing under the APA but under a specific grant of jurisdiction given to federal savings associations pursuant to section 1464(d)(1)(A) of FIRREA. There is no requirement in this grant of jurisdiction that the court consider purely legal issues. Indeed it would be difficult to see how a bank could challenge an action by OTS without reference to the facts of its own finances. Moreover, unlike many other statutory grants of jurisdiction which prescribe finality as a condition for reviewing administrative action, *see*, *e.g.*, 42 U.S.C. §7607(b)(1), finality is not an explicit requirement under FIRREA. However, even if finality were required, I agree with the district court that OTS's

denial of First Federal's capital plan constituted final agency action on this issue.[3] If OTS is able to avoid taking any final agency action sufficient for appeal of this issue short of placing a bank in receivership, the benefit of FIRREA's grant of jurisdiction to federal savings associations to challenge "any matter under this section" would be nullified. I believe it would be anomalous for Congress to confer a special grant of jurisdiction to federal savings associations which could be exercised only after a bank has been placed into receivership and is facing immediate liquidation.

For similar reasons, I don't believe that sections 1464(d)(2)(E) and (G) of FIRREA, which deal with suits for injunctive relief *after* a receiver has been appointed, apply to a claim for injunctive relief *before* a receiver has been appointed. I agree with the analysis in *Century Federal Savings Bank v. United States*, 745 F. Supp. 1363, 1367 (N.D. Ill. 1990), in which the court stated:

> Subsection 1464(d)(2)(G) prohibits the court from removing a receiver except as provided in §1464(d)(2)(E). Section 1464(d)(2)(E) permits an action filed within 30 days of an appointment, and requires the court to reach the merits before taking any action to remove a receiver. These subsections define the court's jurisdiction upon appointment of a receiver.

---

[3]Under the regulations concerning the treatment of supervisory goodwill promulgated pursuant to FIRREA, OTS no longer allows supervisory goodwill to be included in the calculation of regulatory capital. In addition, the regulations require consolidated reporting for a parent corporation and all subsidiaries. A supervisory directive from OTS, consistent with its new capital requlations on the treatment of supervisory goodwill, required that First Federal submit a capital plan for approval by January 8, 1990. On January 8, 1990, First Federal submitted a capital plan, requesting an exemption from these regulations because of its prior agreement with the FHLBB concerning the treatment of the supervisory goodwill created by the acquisition of Citizens. OTS refused to grant the exemption and denied First Federal's capital plan.

> The jurisdictional grant in §1464(d)(1)(A) permits the court to entertain an action other than an action for money damages prior to appointment of a receiver. Section 1464(d)(2)(E) and (G) do not limit this jurisdictional grant, but they insure that a receiver [once appointed] may be removed only upon a decision on the merits. Congress may have determined that once a receiver was appointed, preliminary injunctive relief would have a deleterious effect upon a savings and loan association. After appointment, immediate, unobstructed action by the receiver may be essential to conserve the savings and loan association's assets and prevent panic. *Prior to appointment, injunctive relief may prevent needless liquidation of viable savings and loan associations.* Consistent with the plain language of these subsections, §1464(d)(1)(A) confers jurisdiction to enjoin actions by the OTS director pursuant to 1464.

(emphasis added). Section 1464(d)(1)(A) specifically grants federal savings associations jurisdiction to sue OTS concerning the regulations promulgated pursuant to FIRREA. I believe it would be inconsistent to interpret sections 1464(d)(2)(E) and (G) to mean that a bank must be placed into receivership before exercising this jurisdiction. For these reasons, I believe that in the present case the district court has authority to consider whether a preliminary injunction should be issued that would bar the appointment of a receiver on the ground that OTS's enforcement of its regulations concerning supervisory goodwill abrogates First Federal's prior contract with the FHLBB.

I believe that in the present case this issue is sufficiently ripe for judicial review because First Federal contends that OTS's enforcement of the challenged regulations forces an otherwise solvent bank into insolvency. Under GAAP, First Federal alleges that as of March 31, 1990, it had capital in the amount of 31.6 million dollars. However, the bank alleges it is anticipated that for fiscal 1990, because of the enforcement of the challenged regulations, it will show a loss primarily because it has been forced to recognize the write-off of the supervisory goodwill incurred during the Citizens acquisition. The ripeness doctrine as applied to administrative agencies states that agencies are protected from judicial interference until "an administrative decision has been formalized," and the effects of an administrative decision are felt in a concrete way. *Abbott Labs*, 387 U.S. at 148. I believe that in the present case the decision by OTS to enforce its regulations concerning the treatment of supervisory goodwill was formalized in the denial of First Federal's capital plan and that First Federal's expected conformity with the challenged regulations would cause the bank cognizable injury whether or not the bank is placed in receivership. As in *Abbott Labs*, *Id.* at 152-54, it is demanded by the government that First Federal comply with regulations that have an immediate adverse financial impact and failure to comply with the regulations exposes First Federal to the imposition of strong sanctions. In the present case, OTS's enforcement of its regulations concerning the treatment of supervisory goodwill is neither speculative nor hypothetical. Therefore, I believe a challenge to these regulations is ripe for judicial review. To conclude, I believe the district court was not barred from reviewing this issue by considerations of either jurisdiction or ripeness and the case should be remanded to the district court to determine whether a preliminary injunction should be granted.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 90-CV-60171-AA

FIRST FEDERAL SAVINGS BANK
AND TRUST, et al

v.

T. TIMOTHY RYAN, DIRECTOR, OFFICE
OF THRIFT SUPERVISION, et al

ORDER

[Entered July 19, 1990]

Having reviewed the record, the briefs submitted by the parties and having heard oral argument on the plaintiffs' motion this day, the Court DENIED the motion for preliminary injunction for the reasons stated on the record. However, IT IS FURTHER ORDERED, that the temporary restraining order is continued until July 27, 1990, at 9:00 a.m., at which time it will expire, to provide an opportunity to appeal.

/s/ George La Plata
GEORGE LA PLATA
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 90-CV-60171-AA

FIRST FEDERAL SAVINGS BANK
AND TRUST, et al

v.

T. TIMOTHY RYAN, DIRECTOR, OFFICE
OF THRIFT SUPERVISION, et al

EXCERPT OF MOTION FOR PRELIMINARY INJUNCTION

[Heard on July 19, 1990]

PROCEEDINGS HAD in the above-entitled matter before the Honorable GEORGE LA PLATA, United States District Judge of the Eastern District of Michigan, Southern Division, at U.S. Courthouse and Federal Building, 200 E. Liberty, Ann Arbor, Michigan, on Thursday, July 19, 1990.

THE CLERK: Court recalls the case First Federal versus Ryan.

THE COURT: Because the Court was very sympathetic to the allegations made by the plaintiff originally in this case in their request for a TRO, the Court granted a TRO to maintain the status quo until this motion could be heard this morning.

This Court does have jurisdiction over the subject matter and the named defendants, and they may be sued in this Court pursuant to 12 USC 1464(d) as in Delta (1)(A).

The Court also finds that the case is sufficiently ripe for a ruling on the motion today, where the administrative actions of 1464(t)(6) have been taken.

Now the plaintiff complaint asked that the Court enjoin the appointment of a receiver or a conservator because:

First, First Federal is not in insolvent under GAAP accounting principles and the defendant (5) should not be applying the new capital requirements to them;

And second, that the defendants' regulatory actions were arbitrary and capricious and an abuse of discretion.

Now this Court concludes that the regulatory authority provisions of 1464(d) do not expressly preclude pre-appointment injunction. However, it does set forth specified time periods for filing action to challenge appointment. And to this Court, that implies that court action taken outside the period is not provided for, and this is reinforced by the provision that 1464(d)(1)(G).

Also, since the earlier provision under the Homeowners Loan Act expressly provided for injunctions upon the issuance of cease and desist orders, Congress could have included pre-appointment review, if it intended that.

Finally, the judicial review of appointment provisions of the HOLA and FIRREA are substantially the same. The plaintiff, in fact, seeks to challenge the grounds for appointment, unlike in the Olympic case, which is cited by the plaintiff.

Now the plaintiff asked that the court declare the ex parte appointment a violation of due (6) process. However, the previous regulatory provision provided the same ex parte appointment, and of course, that was not a violation of due process. The Court quotes from Woods, 826 F2d.

In the plaintiff's claim appointment of a receiver or conservator is a taking without just compensation in violation of due process. However, the Court finds appointment is not properly within the meaning of the taking clause. And moreover, injunction is not the proper remedy, as argued by counsel for the defendants.

Now finally, the plaintiffs claim that if capital requirements imposed pursuant to FIRREA cannot be — can be applied to them, the changes frustrate the purpose of the purchase of Citizens by the plaintiffs.

The Court notes that the plaintiffs are not seeking in this action money damages. However, the Court finds that the fundamental purpose of the agreement was to merge the two entities, so the defendants could avoid declaring losses and plaintiffs could get into the Florida market.

Accepting that the forbearances were significant terms on which plaintiff relied, a change in legislation and regulation does not frustrate the purpose, so as to make the purchase of Citizens a void (7) transaction. The governmental agency is not bound by the forbearances where it results from their compliance with congressional mandate, as here.

Now because the plaintiff seeks to challenge the grounds for appointment, this Court finds it is without authority to enjoin the appointment, and to do so would circumvent the legislative scheme for Congress. Accordingly, the Motion for Preliminary Injunction is denied.

However, because the Sixth Circuit has not spoken with respect to this matter, this Court would enter a stay, until any appeal can be taken by the plaintiff. That, counsel, is the ruling of this Court.

MR. SITCOV: Your Honor, may I ask the nature of the stay?

THE COURT: Yes. They're granted an appeal stay, so that, if that's their, if that's what they wish to do.

MR. DAY: Thank you, Your Honor. We do have some motions to make and papers to file in this eventuality. And if the Court is available in a few minutes, we can probably then go forward.

THE COURT: All right. Court stands in recess. But we're talking about the TRO.

MR. SITCOV: So the TRO is still in effect?

THE COURT: Yes. The Court stands in recess.

MR. DAY: Thank you, Your Honor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 90-CV-60171-AA

FIRST FEDERAL SAVINGS BANK
AND TRUST, et al

v.

T. TIMOTHY RYAN, DIRECTOR, OFFICE
OF THRIFT SUPERVISION, et al

AMENDED TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

[Entered on July 10, 1990]

IT IS HEREBY ORDERED that all Defendants, and their officers, agents, servants, employees, attorneys and those acting in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are restrained and enjoined from appointing a conservator and/or appointing a receiver for Plaintiffs, or any one of them, until the Court rules on the motion for Preliminary Injunction.

This Court grants this Order under F.R.C.P. 65 because the Verified Complaint and its exhibits demonstrate (1) Plaintiffs will be irreparably harmed without the protection of this Court by the irretrievable injury to its reputation, goodwill and other assets, and their existence as separate entities caused by the appointment of a conservator or a receiver, which damage is incalculable or which will result in Plaintiffs' ceasing to exist; (2) that Plaintiffs' injury would be prompted by any prior notification to Defendants of this action; and (3) that appropriate relief must be entered without further delay.

IT IS FURTHER ORDERED that you appear on the 19th day of July, 1990 to show cause, if any there be, why an Order should not be issued in this action to restrain and enjoin all Defendants and their officers, agents, servants, employees, attorneys and those acting in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, from appointing a conservator or a receiver for Plaintiffs during the pendency of this action. You will report to the courtroom of this Honorable Court, U.S. Courthouse, Ann Arbor, Michigan, or from taking any other action that would adversely and irretrievably affect the operations or financial condition of the Plaintiffs.

If you have any defenses to this action, you will have an opportunity to be heard at the above time and place. If you fail to appear at the time and place above, the Court is empowered to issue an Order as requested by Plaintiffs.

IT IS FURTHER ORDERED that this Temporary Restraining Order shall remain in effect through Thursday, July 19, 1990 at 9:15 a.m. when the hearing on Plaintiffs' request for a Preliminary Injunction shall be heard, subject to further order of this Court.

/s/ JUDGE GEORGE LA PLATA
UNITED STATES DISTRICT COURT
JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 90-1785

FIRST FEDERAL SAVINGS BANK AND TRUST, A FEDERAL SAVINGS BANK, ET AL.,
Plaintiffs-Appellants,

v.

T. TIMOTHY RYAN, DIRECTOR, ET AL.,
Defendants-Appellees

ORDER

[Filed May 21, 1991]

BEFORE: KEITH and BOGGS, Circuit Judges; and CONTIE, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, CLERK

APPENDIX D

CONSTITUTIONAL PROVISION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS

SECTION 301(5)(d) Federal Savings Associations — Regulatory Authority (relevant portions codified at 12 U.S.C. 1464(d)):

12 U.S.C. 1464(d)(1)(A) provides in part:

> Except as otherwise provided, the Director shall be subject to suit (other than suits on claims for money damages) by any Federal savings association or director or officer thereof with respect to any matter under this section or any other applicable law, or regulation thereunder, in the United States district court for the judicial district in which the savings association's home office is located, or in the United States District Court for the District of Columbia, and the Director may be served with process in the manner prescribed by the Federal Rules of Civil Procedure.

12 U.S.C. 1464(d)(2)(E):

> The Director [of OTS] shall have exclusive power and jurisdiction to appoint a conservator or receiver for a Federal savings association. If, in the opinion of the Director, a

ground for the appointment of a conservator or receiver for a savings association exists, the Director is authorized to appoint ex parte and without notice a conservator or receiver for the savings association. In the event of such appointment, the association may, within 30 days thereafter, bring an action in the United States district court . . . for an order requiring the Director to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Director to remove such conservator or receiver.

12 U.S.C. 1464(d)(2)(G):

Except as otherwise provided in this subsection, no court may take any action for or toward removal of any conservator or receiver, or . . . to restrain or affect the exercise of the powers or functions of a conservator or receiver.

SECTION 301(5)(t) Federal Savings Associations — Capital Standards (relevant portion codified at 12 U.S.C. 1464(t)):

SECTION 401(f), (g) and (h) Savings Provisions Relating to FSLIC and FHLBB Relevant provisions codified at 12 U.S.C. 1437

12 U.S.C. 1437 — SECTION 401(f)(2)

Continuation of suits. — No action or other proceeding commenced by or against the Federal Savings and Loan Insurance Corporation, or any Federal home loan bank with respect to any function of the Corporation which was delegated to employees of such bank, shall abate by reason of the enactment of this Act, except that the appropriate successor to the interests of such Corporation shall be substituted for the Corporation or the Federal home loan bank as a party to any such action or proceeding.

12 U.S.C. 1437 — SECTION 401(g)(1)(A) and (B)

> **(g) Savings provisions relating to FHLBB. — (1) Existing rights, duties, and obligations not affected.** — Subsection (a) shall not affect the validity of any right, duty, or obligation of the United States the Federal Home Loan Bank Board, or any other person, which —
>
> **(A)** arises under or pursuant to the Federal Home Loan Bank Act, the Home Owners' Loan Act of 1933, [12 U.S.C.A. 1461 et seq.] or any other provision of law applicable with respect to such Board (other than title IV of the National Housing Act) [12 U.S.C.A. 1724 et seq.] and
>
> **(B)** existed on the day before the date of the enactment of this Act [Aug. 9, 1989].

12 U.S.C. 1437 — SECTION 401(g)(2) **Continuation of suits. —**

> (A) In general. — No action or other proceeding commenced by or against the Federal Home Loan Bank Board, or any Federal home loan bank with respect to any function of the Board which was delegated to employees of such bank, shall abate by reason of the enactment of this Act, except that the appropriate successor to the interests of such Board shall be substituted for the Board or the Federal home loan bank as a party to such action or proceeding.

12 U.S.C. 1437 — Section 401(h)(1) **Continuation of orders, resolutions, determinations, and regulations.** — Subject to section 402, all orders, resolutions, determinations, and regulations, which —

> **"(1)** have been issued, made, prescribed or allowed to become effective by the Federal Savings and Loan Insurance Corporation or the Federal Home Loan Bank Board (including orders, resolutions, determinations, and regulations which relate to the conduct of conservatorships and receiverships), or by a court of competent jurisdiction, in the performance of

functions which are transferred by this Act [Pub. L. 101-73];

12 U.S.C. 1464(t)(3) TRANSITION RULE. —

(A) Certain Qualifying Supervisory Goodwill Included In Calculating Core Capital. — Notwithstanding paragraph (9)(A), an eligible savings association may include qualifying supervisory goodwill in calculating core capital. The amount of qualifying supervisory goodwill that may be included may not exceed the applicable percentage of total assets set forth in the following table:

For the following period:	The applicable percentage is:
Prior to Jan. 1, 1992	1.500 percent
Jan. 1, 1992 - Dec. 31, 1992	1.000 percent
Jan. 1, 1993 - Dec. 31, 1993	0.750 percent
Jan. 1, 1994 - Dec. 31, 1994	0.375 percent
Thereafter	0 percent

SECTION 501(b)(11) — Resolution Trust Corporation established (relevant portions codified at 12 U.S.C. 1441a(b)(11)):

12 U.S.C. 1441a(b)(11)(B) Review of prior cases
The corporation shall —

(i) review and analyze all insolvent institution cases resolved by the Federal Savings and Loan Insurance Corporation between January 1, 1988, and the date of enactment of the Financial Institutions Reform, record all means by which it can reduce costs under existing agreements relating to such cases, including restructuring such agreements;

(ii) evaluate the costs under existing Federal Savings and Loan Insurance Corporation agreements with regard to the following —

(I) capital loss coverage,
(II) yield maintenance guarantees,
(III) forbearances,
(IV) tax consequences, and
(V) any other relevant cost consideration;

(iii) review the bidding procedures used in resolving such cases in order to determine whether the bidding and negotiating processes were sufficiently competitive; and

(iv) report to the Oversight Board and the Congress pursuant to subsection (k).

The Corporation shall exercise any and all legal rights to modify, renegotiate, or restructure such agreements where savings would be realized by such actions. The cost or income of any modification shall be a liability or an asset of the Corporation or the FSLIC Resolution Fund as determined by the Oversight Board. Nothing in this paragraph shall be construed as granting the Corporation any legal rights to modify, renegotiate, or restructure agreements between the Federal Savings and Loan Insurance Corporation and any other party, which did not exist prior to the date of enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.

12 U.S.C. 1464(t)(5)(E) Consolidation of subsidiaries not separately capitalized —

In determining compliance with capital standards prescribed under paragraph (1) the assets and liabilities of each of a savings association's subsidiaries (other than any subsidiary described in subparagraph (C) (ii)) shall be consolidated with the savings association's assets and liabilities unless all of the savings association's investments in and extensions of credit to the subsidiary are deducted from the savings association's capital pursuant to subparagraph (A).

12 U.S.C. 1464(t)(5)(C) Other exceptions

(ii) Subsidiary insured depository institutions — A savings association's investments in and extensions of credit to a subsidiary —

(I) that is itself an insured depository institution or a company the sole investment of which is an insured depository institution, and

(II) that was acquired by the parent insured depository institution prior to May 1, 1989.

REGULATORY PROVISIONS

SECTION 567.5(a)(2)(vi) of the Code of Federal Regulations of the Office of Thrift Supervision, Treasury (relevant portion codified at 12 C.F.R. § 567.5 — 1-1-91 Edition):

(vi) If a savings association holds a subsidiary (either directly or through a subsidiary) that is itself a domestic depository institution, the Office may, in its sole discretion upon determining that the amount of core capital that would be required would be higher if the assets and liabilities of such subsidiary were consolidated with those of the parent savings association than the amount that would be required if the parent savings association's investment were deducted pursuant to paragraphs (a)(2)(iv) and (a)(2)(v) of this section, consolidate the assets and liabilities of that subsidiary with those of the parent savings association in calculating the capital adequacy of the parent savings association, regardless of whether the subsidiary would otherwise be an includable subsidiary as defined in § 567.1(l) of this part.

OFFICE OF THRIFT SUPERVISION

THRIFT BULLETIN

Handbook: Thrift Activities **Section: 320**
Subject: Capital Adequacy **TB 38-2**

January 9, 1990

Capital Adequacy: Guidance on the Status of Capital and Accounting Forbearances and Capital Instruments Held by a Deposit Insurance Fund

Summary: This Bulletin informs all saving associations that have been operating under capital or accounting forbearances that Section 5(t) of the Home Owners' Loan Act ("HOLA") eliminates such forbearances. Accordingly, these forbearances should be eliminated in determining whether or not an association complies with the new capital regulation. All associations that do not comply with the new capital regulation must submit a capital plan. This Bulletin also clarifies the treatment of capital instruments held by a deposit insurance fund.

For Further Information Contact: The District Office in which you are located or the Supervision Policy Division of OTS, Washington, D.C.

Thrift Bulletin 38-2

Introduction

Questions have been raised regarding the status of previously granted forbearances and waivers as well as the treatment of FSLIC-owned warrants and other capital instruments. This Bulletin provides guidance to savings associations on these matters.

Capital Compliance

The Office of Thrift Supervision is applying the new capital standards to all savings associations, including those associations that have been operating under previously granted capital and

accounting forbearances. Section 5(t) of HOLA as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) eliminates these forbearances.

All savings associations presently operating with these forbearances, therefore, should eliminate them in determining whether or not they comply with the new minimum regulatory capital standards. (Any FSLIC capital contribution that resulted in the creation of goodwill will be subject to the requirements for goodwill established in the capital regulation).

If the association determines that it will fail its minimum regulatory capital requirements upon the elimination of capital and accounting forbearances, it must submit a capital plan to its District Director in accordance with the regulatory capital regulation and Thrift Bulletin 36.

A capital plan will not be acceptable if it includes the continuation of previously granted capital and accounting forbearances. Capital plans already submitted that propose to continue previous capital and accounting forbearances will be either disapproved, returned for revision and resubmittal or conditionally approved with the requested forbearance denied.

Capital Instruments Held by a Deposit Insurance Fund

Capital instruments owned by a party with a financial obligation to a savings association will be treated in accordance with Generally Accepted Accounting Principles (GAAP). For example, under 12 CFR 567, for the purpose of the inclusion in capital of instruments owned by the FSLIC or the FDIC, the Office will rely on the presentation standards established under GAAP. FSLIC or FDIC holdings of capital instruments (including, but not limited to, warrants, preferred stock and subordinated debentures) will be required to be offset by any receivables (on the asset side of the balance sheet) from FSLIC or the FDIC for the purpose of calculating the amount of such holdings to be included in capital. The amount of the offset is limited to the amount of the FSLIC or FDIC capital instrument.

When there is no offsetting obligation, the value of warrants and other qualifying core capital instruments may be counted as core capital unless the holder of the warrants and other instruments is a federal deposit insurance fund. If the holder of the capital instruments is a federal deposit insurance fund, then they must be classified as supplementary capital.

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